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Supreme Court of the United States

OCTOBER TERM, 1904

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HOWE SCALE COMPANY OF 1886 AND PAY-SHOLES COMPANY,
Defendants-Appellants,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Complainant-Appellee.

No. 130

Brief of Argument for the Complainant-Appellee

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ANDREW H. KELLOGG CO., Printers, New York. 1905.

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Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

HOWE SCALE COMPANY OF 1886 and FAY-SHOLES COMPANY,
Defendant-Appellants,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Complainant-Appellee.

No. 130.

BRIEF FOR APPELLEE, WYCKOFF, SEAMANS & BENEDICT.

Statement of Case.

This case is brought to this Court on petitions for writ and cross-writ of certiorari ordered and directed to the United States Circuit Court of Appeals for the Second Circuit.

Complainant-Appellee, a New York corporation, commenced this suit in equity in the United States Circuit Court for the District of Vermont against the Defendant-Appellant, Howe Scale Company of 1886, which is a corporation under the laws of the State of Vermont, and in its bill of complaint, among other things, prayed for an injunction re-

straining said Appellant from advertising for sale, offering for sale or selling typewriting machines manufactured by the "Remington-Sholes Company," now known as the Fay-Sholes Company, bearing the name "Remington" or "Remington-Sholes" or "Rem-Sho" or "Remington-Sholes Company," and from advertising for sale, offering for sale or selling any such machines under said designation, or under any designation of which the name "Remington" was a part. The gravamen of the bill is fraud and unfair competition in business. The chief postulate of the bill and the case is that Complainant's product—typewriting machines—has for many years been known in the markets and to the trade and public, and has been referred to, identified, offered for sale and sold as the "Remington typewriter," and that Complainant and its business have been known to and designated by the public as the "Remington Company" and the "Remington Typewriter Company." The Appellant, Howe Scale Company of 1886, is charged with having *malo animo* inaugurated an inequitable and unfair competition in that it has made use of a simulated corporate name, Remington Sholes Company, and the designations "Remington-Sholes," "Rem-Sho" and "Remington-Sholes Company," in advertising for sale, offering for sale and selling typewriting machines as alleged and set forth in the bill of complaint.

The Appellee, Wyckoff, Seamans & Benedict, was incorporated under the laws of the State of New York in 1892, and is the successor in the typewriting business, and the good will thereof, of two "Remington" corporations—E. Remington & Sons and the Remington Standard Typewriter Manufacturing Company—the elder of which was incorporated in 1865, and founded its typewriter business in 1873. The manufactory and works of Appellee were established at Ilion, N. Y., by Appellee's predecessors, E. Remington & Sons. They

have been increased in size and capacity, from time to time, to meet the demands of the constantly growing business, which is now the largest and most valuable of its kind in the world. Its machines are favorably and widely known to the public as the "Remington Typewriter." The Appellant, Howe Scale Company of 1886, was at the date of the filing of the bill of complaint—Sept. 30th, 1898—the general sales agent in the United States of an Illinois corporation, known as the "Remington Sholes Company," and was actively engaged in introducing, commending and advertising, and in many ways offering for sale and selling the typewriting machines known as the "Remington Sholes" typewriter or "Rem-Sho" typewriter. These machines were made by the Illinois corporation, above named, whose factory was located at Chicago.

In its answer and otherwise, Appellant, Howe Scale Company, justifies by virtue of what it alleges to be the right of the Remington Sholes Company, now Fay-Sholes Company, to use said names and designations in the sale, etc., of typewriting machines, and fully identifies itself with that company.

The proofs show that the defense in the suit was assumed, conducted and paid for by the Remington Sholes Co., now the Fay-Sholes Company, which was and is the *real* party in interest herein. (Record 1358-1496).

The United States Circuit Court for the District of Vermont found and held that the use of the name "Remington" by the appellant, Howe Scale Company, was an unjustifiable invasion of Complainant-Appellee's right to the use of that name, and held that appellee was entitled to a decree suppressing the use of the name "Remington" in the compound or hyphenated name "Remington-Sholes" and the use of the abreviation "Rem," upon the said defendant-appellant's writing machines and in the sale thereof. From the decree

entered upon the decision of the said Circuit Court the Appellant, Howe Scale Company of 1886, appealed to the United States Circuit Court of Appeals for the second circuit, which latter court reversed the decree of the former without costs, and remanded the case with instructions to the Court below to decree in favor of Complainant-Appellee only as to the name "Remington."

The decision of the Circuit Court for the District of Vermont will be found 110 Fed. Rep., p. 520, and that of the Court of Appeals, 122 Fed. Rep., p. 348.

Shortly after the decree was made and entered in the United States Circuit Court for the District of Vermont, the "Remington-Sholes Company" eliminated the word "Remington" from its corporate name, and its machines and advertising *media*, discontinued the use of the abbreviation or short name "Rem," and substituted therefor the name of "Fay," who was the chief promoter, stockholder and President of that company, in all connections in which the name "Remington" had theretofore been used.

Soon after the Remington-Sholes Company ceased to use the name "Remington" in its corporate name and business, and upon its machines, Franklin Remington left the employ of that company, and ceased to have any active connection therewith, becoming President and General Manager of the Foundation & Contracting Company, a corporation under the laws of the State of New York, and has since, mainly, if not wholly devoted his time and attention to the business of the Foundation Company in the City of New York.

Assignment of Errors.

The errors assigned in this case by the Howe Scale Company are in substance and effect,

1. That the Courts below erred in overruling and disregarding Appellant's motion to suppress certain evidence introduced in behalf of Complainant-Appellee.

Record, pp. 1440–1443.*

2. That the Courts below erred in finding and holding that the advertising for sale, offering for sale and selling, by Defendant-Appellant, of typewriting machines manufactured by the Remington-Sholes Company, now Fay-Sholes Company, under the name of and as Remington-Sholes typewriters, in the manner and circumstances disclosed in the proofs in this case, constituted an unlawful invasion of Complainant-Appellee's rights, and an unfair and inequitable competition, by reason of which Complainant-Appellee was entitled to a decree, restraining the appellant, Howe Scale Company of 1886, from using the name "Remington" upon and in connection with the sale of typewriting machines.

The Complainant-Appellee, Wyckoff, Seamans & Benedict, assign as error herein and say that the United States Circuit Court of Appeals for the second circuit erred in deciding, finding and holding that the short or abbreviated name "Rem-Sho" was not sufficiently like "Remington" to be by itself a reasonable cause of confusion, and in directing the Circuit Court of Vermont to decree in favor of Complainant-Appellee only as to name "Remington."

It is thought that it will materially aid the Court, if the above mentioned errors are discussed as they arise upon a presentation of the whole case and in the following order:

1. The primary postulate of complainant-appellee's case—that prior to the organization of the "Remington-Sholes Typewriter Company" and the

* See Brief on Appeal from Order, etc.

"Remington-Sholes Company," and when the bill herein was filed, the terms "Remington" and "Remington Typewriter," constituted designations by means of which complainant's writing machines were identified, and which were used by the trade and the public to distinguish its product and to effect the purchase and sale thereof.

2. The exclusive right of the complainant-appellee, as against the defendant and its principal, to the use of the name "Remington" and the abbreviation "Rem."

3. The right of the complainant-appellee to have enjoined the use of the term "Remington" in the compound or hyphenated name "Remington-Sholes" and the abbreviation "Rem" in the short name "Rem-Sho," upon and in connection with the sale of typewriting machines.

History of Appellee and its Predecessors and Their Typewriter Business.

The complainant and its predecessors, in the typewriter business, reach back more than thirty years, namely, to the early part of the year 1873.

Its earliest predecessor, and the founder of its business, was E. Remington & Sons, a corporation created in 1865, by and under the laws of the State of New York, for the manufacture and sale of fire arms (R., pp. 16–663–665). This corporation took the name, property and franchises of a co-partnership theretofore existing, and between the years 1865 and 1886 was extensively engaged in the manufacture and sale of fire arms, cartridges, typewriters and other devices.

R., pp. 37, 38.

E. Remington & Sons commenced the manufacture and sale of the pioneer commercial typewriter in 1873 and continued the same until about March,

1886, when that corporation was dissolved (R., pp. 38–47). Its writing machines were manufactured at Ilion, N. Y., where its extensive plant was located, and they were extensively sold throughout the United States and in sundry foreign countries.

R., pp. 46, 52–55.

In or about March, 1886, Wyckoff, Seamans & Benedict, a co-partnership, which had been since 1882 and then was the sole selling agent of the "Remington" typewriter, purchased the entire typewriter branch of E. Remington & Sons' business, as hereinafter stated.

R., 66–72, 710–713, 716–729.

Wyckoff, Seamans & Benedict purchased said typewriter business with a view to forming a corporation, which they thereafter, and in or about the month of April, 1886, organized under the laws of the State of New York by the name and style of "Standard Typewriter Manufacturing Company," to which all the rights, franchises, property and interests theretofore acquired by them were duly conveyed.

R., pp. 66–72, 730–753.

In the year 1888 it was deemed advisable by the Standard Typewriter Manufacturing Company to associate more clearly still, the name "Remington" with its machine and business, and accordingly the name of the corporation was changed to "Remington Standard Typewriter Manufacturing Company."

R., pp. 73–74, 753–763.

This corporation continued to manufacture the same machines until 1892, when it was succeeded in the manufacture thereof by the appellee herein.

R., pp. 76–79.

From the year 1882 until the year 1892 the firm of Wyckoff, Seamans & Benedict, composed of

William O. Wyckoff, Clarence W. Seamans and Henry H. Benedict, was the sole selling agent of the writing machines manufactured by E. Remington & Sons, and afterward by Standard Typewriter Manufacturing Company, later known as Remington-Standard Typewriter Manufacturing Company.

R., pp. 52, 53, 74, 76.

In the year 1892 it was deemed advisable to unite the manufacturing and selling branches of the typewriter business in one corporation, and, accordingly, a corporation was organized under the laws of the State of New York called the "Standard Typewriter Company," which took over the interests and property of Wyckoff, Seamans & Benedict in the selling branch of the business, and immediately thereafter, by proceedings duly taken under the laws of New York, a consolidation was effected of the Remington Standard Typewriter Manufacturing Company and the Standard Typewriter Company, forming a new corporation under the name Wyckoff, Seamans & Benedict.

R., pp. 76, 77, 764–788.

The complainant appellee, Wyckoff, Seamans & Benedict, was, after the year 1892, both the manufacturer and seller of the "Remington" typewriter.

R., pp. 76, 79.

Wyckoff, Seamans & Benedict, corporation, therefore, personifies the typewriter enterprise and business founded, in 1873, by E. Remington & Sons, and for many years thereafter carried on by said corporation.

The new corporation, known as Wyckoff, Seamans & Benedict, acquired by purchase, by transfer, and by operation of law, all the property, rights, interests, franchises, patents, trade-names and trademarks, and the good-will of the business of its predecessors, E. Remington & Sons and Remington

Standard Typewriter Manufacturing Company, relating to the manufacture and sale of typewriters.

R., pp. 76–79, 764–793.

The business was a constantly growing one from the beginning. The first year there were probably 300 machines made, while in the year 1898 upwards of 25,000 machines were manufactured and sold, and since that time the works have been enlarged, and the annual output of machines has been very largely increased.

R., p. 95.

Appellee's machines have been extensively advertised, and are sold in all States and Territories of the United States, in Canada, Mexico, the South American States, England, Scotland, Ireland, Wales, Norway, Sweden, Denmark, Germany, France, Italy, Portugal, Spain, Hungary, Bohemia, Russia, Turkey, South Africa, Australia, New Zealand, West India Islands, Egypt, India, Strait Settlements, China, Japan, Central America, and the Hawaiian Islands, and other places.

R., pp. 95, 96, 211.

From the date of the removal of the business to the New Works, in 1889, which were located a short distance from the old factory, the Remington Standard Typewriter Manufacturing Company commenced purchasing the newest and latest style of machinery for the purpose of increasing its facilities for the manufacture of typewriters in greater numbers and of better quality, and no expense has been spared from that time to the present which could be of any benefit, either as regards the quality of the machines or in any way facilitate their manufacture. The plant has been enlarged so that it includes a greater amount of floor space than was previously occupied, and from about 200 employees at the factory of E. Remington & Sons in 1886, the number in 1899 had been increased to about 900. The

machines manufactured by the Remington Standard Typewriter Manufacturing Company and by Wyckoff, Seamans & Benedict Corporation have been from time to time designated by numbers, to wit, numbers 2, 3, 4, 5, 6, 7 and 8, etc., each number designating a somewhat different style of machine. Some time ago the complainant ceased to manufacture machines of lower number than the No. 6, which is the model now chiefly sold and used in the United States. The number 7 and the number 8 machines are chiefly sold and used in foreign countries.

R., pp. 79, 91–95, 96, 97, 98.

From the year 1882, when the firm of Wyckoff, Seamans & Benedict became the sole selling agents of the writing machines manufactured by E. Remington & Sons, up to the first of May, 1899, more than $1,000,000 had been expended in advertising said machines, exclusive of large sums expended by dealers and outside representatives, and at that time 250,000 machines had been manufactured and sold, which number has since been augmented to nearly half a million machines.

R., pp. 211, 212, 237.

The members of firm of Wyckoff, Seamans & Benedict were prior to 1882 connected with the Remington typewriter business.

William O. Wyckoff was, prior to 1882 an agent for the sale of the Remington typewriter from the time that it was first put upon the market, about 1874, until he became a member of the firm of Wyckoff, Seamans & Benedict in the year 1882.

Clarence W. Seamans was, about the year 1878, appointed manager of the typewriter department of E. Remington & Sons in the City of New York, and held that position until 1882, when he became a member of the firm of Wyckoff, Seamans & Benedict.

Henry H. Benedict, of the firm of Wyckoff, Seamans & Benedict, was connected with E. Remington & Sons in 1873, when the typewriter was taken on by said corporation, and he continued in its employ until 1882, when he too became a member of the firm of Wyckoff, Seamans & Benedict. He was a member of the Board of Directors of E. Remington & Sons, and held a prominent place in their councils.

R., pp. 52, 62, 63, 64.

Prior to 1882 the machines manufactured by E. Remington & Sons were sold through a variety of agencies, sometimes one G. W. N. Yost acted as agent for the sale of them, and, at one time, he associated with himself other parties, who purchased the machines from E. Remington & Sons and sold them. Later said corporation sold its own machines through its agencies in New York City, Washington, D. C., Chicago, Ill., Boston, Mass., Atlanta, Ga., and in sundry other cities in the United States, and through its offices in London and elsewhere in Europe.

R., p. 52.

In 1882 the firm of Wyckoff, Seamans & Benedict became the exclusive agent for the sale of the machines, and from that time forth and until March, 1886, they took the whole output of the typewriter department of E. Remington & Sons, and sold the machines throughout the United States and in many foreign countries.

R., pp. 52–54, 710–713.

E. Remington & Sons manufactured machines like complainant's exhibit "The Typewriter, Manufacturer's number 1640," with some modifications and in considerable quantity up to 1877. After 1877, they manufactured many thousands of upper and lower-case machines denominated the No. 2 machine. Other styles of machines were also manufactured and sold, designated 3, 4 and 5. After the

No. 2 machine came on the market, the demand for the No. 1 gradually fell off until the manufacture and sale of it entirely ceased, which was about 1884 The numbers designating the various machines, as Nos. 2, 3, etc., were employed to indicate differences in details of structure.

R., pp, 93, 94, 97, 98.

From the beginning of its manufacture, by E. Remington & Sons, "The Typewriter" gradually came into public favor and for several years, until 1880—it was without a rival in the market.

R., p. 206.

The typewriter businesss of E. Remington & Sons was a constantly growing one, and was carried on without interruption. Several thousand upper-case machines were manufactured and sold, and prior to March, 1886, said corporation had also manufactured and sold more than 20,000 of the No. 2 machines.

R., pp. 94 95.

SALE OF THE TYPEWRITER BUSINESS BY E. REMINGTON & SONS.

On the 22nd day of March, 1886, E. Remington & Sons sold their entire typewriter business to Wyckoff, Seamans & Benedict. This purchase covered an agreement of license, from The Typewriter Company and James Densmore as Trustee to E. Remington & Sons, to manufacture writing machines under certain patents, together with all rights, privileges, franchises, property and interests secured in and by said license. Also all rights, privileges and franchises which E. Remington & Sons owned or held in and about the manufacture and sale of typewriting machines, together with the right to use and employ, on writing machines, the title "Standard Reming-

ton Typewriter," to the exclusion of said corporation. Also all special tools pertaining to the manufacture of typewriters, including patterns and models, and all materials specially provided for the manufacture of writing machines in, or about the works, whether raw material or in process of manufacture, all machines in process of construction, and sundry machines and tools, a schedule of which was set forth in the contract. The said corporation, E. Remington & Sons, also covenanted and agreed not to engage in the manufacture and sale of typewriting machines within the period of ten years from the date of said agreement.

R., pp. 66, 67, 716-723.

The firm of Wyckoff, Seamans & Benedict also took a three years' lease of that portion of the works of E. Remington & Sons in which the manufacture of writing machines had been and then was carried on.

R., pp. 66-69, 96, 725-728.

Said firm held the title to said property as "quasi trustees," and so carried on the business for a short while, that is, until the month of April, 1886, when a corporation was formed, under the laws of the State of New York, by the name and style of "Standard Typewriter Manufacturing Company," which took over all the property, rights, franchises and interests theretofore acquired of E. Remington & Sons by said firm.

R., pp. 72, 73, 730-753.

The "Standard Typewriter Manufacturing Company," whose name was subsequently changed to Remington Standard Typewriter Manufacturing Company (R., pp. 753-764), owned and carried on the business of manufacturing and selling said writing machines until 1892. The manufacture of the writing machines at the same place went on for the few days that Wyckoff, Seamans & Bene-

dict held the title, and subsequently was carried on by the Standard Typewriter Manufacturing Company without any break, *they employing the same Superintendent and the same skilled workmen who had been employed by E. Remington & Sons in its typewriter manufacturing department*, and the business was continued in substantially the same manner as it had theretofore been conducted. There was, however, a greater impulse given to the business, and the manufacture of machines rapidly increased in quantity, until within two years or less from the time of said sale and transfer of the business by E. Remington & Sons, as aforesaid, there were being manufactured by the "Standard Typewriter Manufacturing Company" from 40 to 60 machines per day.

R., pp. 72–73, 75, 76.

At or about the expiration of the three years' lease, heretofore mentioned, to wit, in the year 1889, the Remington Standard Typewriting Manufacturing Company first leased, and then bought, a large manufacturing plant about ½ of a mile from the premises theretofore occupied, known as the Remington Agricultural Works, and the typewriter machinery, tools and appliances were moved to this place, and, without any break worth mentioning, the manufacture of the machines was continued in the new works, where they have ever since been manufactured.

R., pp. 73, 74, 96, 97.

After the Standard Typewriter Manufacturing Company, later known as Remington Standard Typewriter Manufacturing Company, acquired the business, the machines were much more largely manufactured and sold, and agencies were established in almost every city of importance in the United States, and in many of the larger cities in England and on the Continent of Europe.

DESIGNATIONS OF THE MACHINES.

For the first few years and until the production of the No. 2 typewriter, about 1877, the machine was technically known and designated as the "Sholes & Glidden" typewriter, although even then, in the general speech of people, it was more frequently spoken of as the "Remington typewriter." Up to the time of the production of the "Caligraph" machine, (about 1880), it was also frequently spoken of as "The Typewriter." After the production of the No. 2 machine, which was substantially different in structure and mode of operation from the No. 1, the machine became more distinctively the Remington typewriter, not only because it was being manufactured by E. Remington & Sons, but also because it had been so thoroughly re-organized at their works as to become in a larger sense the product of their skill and that of their workmen. From that time forth, the word "Remington" became more generally and more naturally associated with the machine as a distinguishing appellation, and after the "Caligraph" was put upon the market, it became generally known and designated as the "Remington," and thereafter it was advertised under that name alone, or in conjunction with the word "Perfected," and later with the word "Standard."

R., pp. 64, 65, 91, 92, 97.

As early as the year 1880, the machines were marked with and bore the name Remington, which was afterwards conspicuously placed on the paper-table of the machine and was also stamped on the machines in connection with other words.

R., p. 791.

In 1888, the Standard Typewriter Manufacturing Company registered the name "Remington" as a trade-mark for its writing machines. This trade-mark was duly assigned to complainant in May, 1892.

R., pp. 75, 76, 95, 788, 795.

COMPLAINANT - APPELLEE EXCLUSIVE OWNER OF ALL TRADE-MARKS AND TRADE-NAMES OF ITS PREDECESSORS RELATING TO THEIR TYPEWRITER BUSINESS.

Under the consolidation proceedings, based on the New York statutes, all the property relating to the typewriter business of predecessors passed by operation of law to the complainant appellee, save and except such as was created by or existed under the statutes of the United States. The patents and the *registered* trade-marks were, however, duly assigned, so that no question in that regard can arise in this case.

The complainant having acquired the good will of the typewriter business founded by E. Remington & Sons and carried on by it, and by its successors, and being rightfully in possession of said business, it is unnecessary to concern ourselves about the technical character of the conveyances from one purchaser of the business to another, or the fact that the name "Remington" may have had at the outset a specific meaning as indicating a particular concern.

Richmond & Co. *v.* Richmond, 159 U. S., 293.

Walter Baker & Co. Ld., *v.* Sanders, 80 Fed. Rep., 889.

Raymond *v.* Royal Baking Powder Co., 85 Fed. Rep., 231.

Furthermore the circumstance that the corporation, E. Remington & Sons, long since ceased to manufacture typewriting machines, and was dissolved, is wholly immaterial, insofar as complainant's legal rights are concerned. That the complainant has the legal right to designate its product by the trade-names and trade-marks adopted and used by E. Remington & Sons and by its other predecessors, is abundantly supported by authority.

In Kidd *v.* Johnson, 100 U. S., 618, it appeared that the trade-mark in question was the designation "S. N. Pike's Magnolia Whiskey." This trade-mark was sold to Mills, Johnson & Co. by Pike, together with the distillery, the product of which it had been used to identify. Pike died in 1872, and Mills, Johnson & Co. continued to use the trade-mark. This Court said: "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. * * * Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the *same character* as those to which the mark was attached by its original designer."

In the case of LePage Co. *v.* The Russia Cement Co., 51 Fed. Rep., 943, Judge Putnam, speaking for the U. S. Circuit Court of Appeals of the First Circuit, said: "It is equitable that a manufacturer or dealer, who has given reputation to any article, should have the privilege of realizing the fruits of his labors by transmitting his business and establishment with the reputation which has attached to them, on his decease, to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law, and with justice to the community, that any trade-mark, including *a surname*, may be sold with the business or the establishment to which it is incident; because, while it may be that individual efforts gave them their value at the outset, yet, afterwards, this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thenceforward depends less on the individual efforts of the originator than on the combined result of all which he created."

In Russia Cement Co. *v.* LePage Co., 147 Mass., 206, the case of Hoxie *v.* Chaney, 143 Mass., 592,

was approved. The Court referred to Hoxie *v.* Chaney as being "quite conclusive," and added: "It was there held that 'A. N. Hoxie's Mineral Soap' and 'A. N. Hoxie's Pomice Soap' were trade-marks and assignable as such, and that they did not necessarily mean that the soaps were made by A. N. Hoxie."

This Court in Brown Chemical Co. *v.* Meyer, 139 U. S., 548, said: "So in Menendez *v.* Holt, 128 U. S., 514, it was held that when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of the old place of business and the future conduct of the business by them under the old name, the good-will remains with the latter, as of course, and that, under such circumstances, the right to use a trade-mark passes to the remaining partners as a part of such good-will. There are a few cases indicating that the mere right to use a name is not assignable, notably Chadwick *v.* Covell, 151 Mass., 190, but none that it may not be assigned to an outgoing partner or to a successor in business as an incident to its good-will. Ainsworth *v.* Walmsley, L. R. I. Eq., 518; Derringer *v.* Plate, 29 Cal., 292."

To the same effect are the cases of Clark Thread Co. *v.* Armitage, 74 Fed. Rep., 940, and Rahtjen's American Composition Co. *v.* Holzappel's Composition Company, 101 Fed. Rep., 260. There is no doubt about the rule.

In this case the name used by the complainant-appellee, upon and in connection with the manufacture and sale of its machines, is one which was selected and used by its predecessor, E. Remington & Sons, and later used and registered as a trade-mark by its predecessor, "Standard Typewriter Manufacturing Company." The fact that the name "Remington" is not a part of complainant-appellee's corporate name is wholly immaterial; for, as said by Mr. Kerly in his Law of Trade-Marks, 2d Ed., at. p. 463: "*The name need not be the personal name of the plaintiff. It need not even be that of*

a predecessor in business, for a trader may lawfully adopt and trade under any name which is unappropriated for business of the same kind, *and when the name has become his by repute, he is as well entitled to protection for it as if it were his own.*"

To the same effect is the case of Wm. Rogers M'f'g Co. *v.* Rogers & Spurr M'f'g Co., 11 Fed. R., 495, 498.

The manifest purpose of the complainant-appellee in using the designation "Remington typewriter," etc., as that appellation has been and is used in innumerable connections upon its writing machines, and in catalogues, circulars and advertisements, and in a multiplicity of other ways, was and is to preserve and perpetuate the individuality of its product in connection with the business of the corporation, which founded the typewriter business of which complainant-appellee is the lawful successor. Said designation means and symbolizes the typewriter business established and carried on by E. Remington & Sons.

APPELLEES' BUSINESS AND THE GOOD-WILL THEREOF.

The complaintant-appellee stands in the shoes of its predecessors, and whatever rights or interests they acquired, held or possessed, as regards the manufacture and sale of the "Remington" typewriter, are now duly and fully vested in it. It is clearly manifest from an examination of the several conveyances from E. Remington & Sons to the firm of Wyckoff, Seamans & Benedict, and from said firm to that which came to be known as the "Remington Standard Typewriter Manufacturing Company," and the consolidation proceedings leading to the formation of the complainant corporation, that all property, rights and interests of every name and nature relating to the typewriter business founded by E. Remington & Sons, including the

good-will of said business and the trade-names and trade-marks, became and now are the property of complainant-appellee.

Whilst it is true that the good-will of the business is not *specifically* mentioned in the several conveyances, nevertheless, in each case, the *whole* typewriter business was conveyed, and the language of the conveyances is sufficiently broad and inclusive to cover the whole business and the good-will, trade-names and trade-marks used therein.

The rule of law is well settled that the good-will of a business passes and is included in an assignment or conveyance which conveys all the assignor's interests in the premises and effects *without specifically referring to the good-will.*

> Shipwright *v.* Clements, 19 W. R., 599; Wilmer *v.* Thomas, 74 Md., 485; Boon *v.* Moss, 70 N. Y., 473.

Trade-marks and the good-will of a business are inseparable, and hence a trade-mark will pass under a general conveyance of all the assets, etc., though not specifically designated.

> Morgan *v.* Rogers, 19 Fed. Rep., 596; LePage Co. *v.* Russia Cement Co., 51 Fed. Rep., 943; Sebastian's Law of Trade-Marks, 4th Ed., p. 299, and cases cited; Kerly's Law of Trade-Marks, 2nd Ed., 330.

Sebastian says (4th Ed., p. 299) that "The sale of a business carries with it the good-will and trade-marks, and the sale of a business and good-will carries with it the right to the trade-names, and the words, assets and effects of every kind and nature, in a bill of sale of a business, cover the trade-marks used in the business."

As already observed, the language of the conveyances is comprehensive enough to vest in the complainant-appellee the good-will, trade-names and trade-marks used in said typewriting business.

The good-will of the complainant-appellee's business is a very valuable one. The proofs show that the Remington typewriter was the *first* commercial writing machine ever placed upon the market, and was the only one in commercial use prior to the year 1881. Since the business was first established, the manufacture and sale thereof has steadily increased, and complainant's machines are now known, used and sold in all parts of the civilized world. The business has grown to be the largest one of its kind in the world, and it is no exaggeration to say that more Remington typewriters are manufactured and sold than of all other makes combined. In May, 1899, 250,000 of complainant's machines had been sold, and since that time the number has been augmented to nearly half a million machines. A great deal of time, energy and money have been expended in pushing and extending complainant's business, *and the evidence establishes that from the year 1882 up to May, 1899, more than $1,000,000 had been expended in advertising complainant's machines and business.* It always has been and is today the *best* machine on the market. In other words, it is the Standard Writing Machine.

R., p. 207.

In Hilson Co. *v.* Foster, 80 Fed. Rep., 896–897, the Court said: "Where the goods of a manufacturer have become *popular*, not only because of their *intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the good-will thus created is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings, or machinery, and a rival in business has no more right to use the one than the other, no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them. No one should be permitted to step in at the eleventh hour and appropriate advantages resulting from years of toil on the part of another.*"

Good-will has been variously defined by the courts. In Menendez *v.* Holt, 128 U. S., 514–522, Chief Justice Fuller says: "Good-will was defined by Lord Eldon in Cruttwell *v.* Lye, 17 Ves., 335, 346, to be 'nothing more than the probability that the old customers will resort to the old place;' but Vice-Chancellor Wood in Churton *v.* Douglas, Johnson, V. C., 174, 188, says: 'It would be taking to narrow a view of what is there laid down by Lord Eldon to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, *or with the name of the late firm*, or with any other matter carrying with it the benefit of the business.'"

In that case it was held that a trade-mark might be part of the good-will of a firm and was in fact a part of the good-will of the appellee's firm

In Knoedler *v.* Boussod, 47 Fed. Rep., 465, 466, the Court said: "*The good-will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor.*"

In Washburn *v.* National Wall Paper Co., 81 Fed. Rep., 17–20, the Court defined good-will as follows: "Good-will has been defined 'as all that good disposition which customers entertain toward the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it.' There is nothing marvelous or mysterious about it. When an individual or a firm or a corporation has gone on for an unbroken series of years conducting a particular business, and has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of goods dealt in, so absolutely honest and fair in all business dealings that customers of the concern have become convinced that their experience in the future will

be as satisfactory as it has been in the past, while such customers' good report of their own experience tends continually to bring new customers to the same concern, there has been produced an element of value quite as important—*in some cases, perhaps, far more important—than the plant or machinery with which the business is carried on.* That it is property is abundantly settled by authority, and, indeed, is not disputed."

In this case the Circuit Court of Appeals, speaking by Judge Lacombe, said: "It is not disputed here that the firm and the corporation of E. Remington & Sons acquired a high and well deserved reputation for careful workmanship in every branch of manufacture which it undertook, nor is it disputed that the typewriting machines which the corporation and its successors have continuously manufactured at Ilion are most favorably known to the public and associated in the public mind with the name 'Remington,' so that the ordinary purchaser is quite likely to assume that a machine offered to him for sale as a 'Remington' has come from an establishment founded by the Remingtons at Ilion nearly half a century ago. To this manufacture and trade complainant succeeded in 1886; it thereupon became entitled to conduct the business of manufacturing machines and selling them as Remington machines, and would have the right to invoke the aid of a Court of Equity to restrain another trader from any action which would be calculated unnecessarily to confuse the goods of his own make with those of complainant."

VALUE OF NAME REMINGTON.

The name "Remington," which has for many years been generally and widely known to the trade as symbolizing complainant-appellee's product and business, is a very important and valuable part of the good-will of its business.

Testifying concerning the reputation of complainant-appellee's product and the good-will connected therewith, Silas W. Crandall (R., pp. 544, 545) says: "I had in mind the fact that the reputation of an article, particularly of a typewriter, its good-will in the estimation of the public, was the most important fact connected with the sale of the article or a typewriter. The reputation of the typewriter is probably more advantageous than a complete selling organization.

"Its value is inestimable. * * * The name and the reputation of the Remington typewriter are synonymous terms. We meet with this fact personally, and in correspondence, particularly in talk with competitors and competitors' salesmen, in the evident desire of competitors' salesmen to associate themselves with our organization, receiving applications from them often and repeatedly, being assured by them that if they could make even a humble record with another machine, with the Remington they could make a brilliant success. With conversations with customers, past and prospective, our attention often being called to the fact that a machine they have bought, used before, had given especial satisfaction, and that they were pleased to duplicate the purchase, because of the fact, *and considered that the name was synonymous for good principle, selection of material, workmanship, and finish*; and we have had our attention also called to this fact by manufacturers and tradesmen in other lines of business by using some expression, for instance, 'As good as the Remington,' or 'The Remington is synonymous with the best.'"

Another witness called on behalf of complainants was Mr. John S. Bayes, who says: "The Remington is very widely and favorably known by typewriter users, and the general reputation of the machine no doubt affects the sale materially of typewriters. It is frequently said by typewriter salesmen, who represent other machines, that theirs are as good as the Remington, and the question is frequently asked by the public whether such and such a machine is as good as the Remington."

Being asked to what extent, according to his experience and observation, the name Remington was a controlling factor in the sale of a writing machine, he said: "I don't believe that it would be possible for to sell 25 per cent. of the number that are now being sold if the name was taken off and it was marketed as another machine."

R., pp. 549–550.

Mr. John F. McClain, a witness for appellee, who has had a very large experience and observation in connection with the sale of writing machines, and particularly with the Remington typewriter, says: "The reputation of the machine is such that I find everywhere a predisposition in its favor and in many cases on the part of the people who do not know why they have it; who never saw a typewriter and never used one, but who instinctively think of the Remington when the subject of writing machines is mentioned; and who to that extent are prejudiced in its favor. I find also salesmen of other machines frankly admit that *it is Remington name* rather than Remington merit they find the hardest to fight." Being further interrogated as to what extent the name "Remington" aided in the sale of typewriting machines, irrespective of particular construction or mode of operation, he answered that it was "half the battle."

R. V., II., p. 607.

To the same effect is the evidence of Baer, R., p. 602, and Crean, R., p. 595.

The great repute and value of appellee's business was admitted by the learned counsel for the defendant-appellant in the Courts below. They there said: "When the Remington-Sholes Company and its predecessor entered the field, complainant had a world-wide reputation" (Brief, p. 98).

We have particularly called the attention of this Court to the great value of the good-will of complainant's business, because this case is one that is concerned with an injurious attack upon it. "All such cases, whether of trade-mark, or trade-name, or other unfair use of another's reputation, are concerned with an injurious attack upon the good-will of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to the other. Trade-marks are really a branch of the good-will of the business with which they are connected, representing it in the market, while the trade-name over the shop represents it to the passer-by."

Sebastian's Law of Trade-Marks, 4th Ed., 17.

REMINGTON CONCERNS.

Prior to 1894, the only Remingtons who had ever been engaged in the manufacture or sale of typewriting machines were complainant's predecessors, E. Remington & Sons and Remington Standard Typewriter Manufacturing Company, to whose business, good-will, trade-names and trade-marks complainant-appellee succeeded.

Moreover, complainant-appellee's writing machines were the first and the only ones that were ever known or designated by the name "Remington," or bore that name, until the so-called "Remington-Sholes Typewriter" was put upon the market, in or about December, 1894.

R., pp. 61, 62, 101, 410.

COMPLAINANT-APPELLEE'S TRADE-NAME.

"Remington Company," "Remington Typewriter Company," etc., in the mind of the public mean appellee and its business, and it was so known prior to the organization of the "Remington-Sholes Company" and the "Remington-Sholes Typewriter Company."

This fact is alleged in the bill of complaint herein.

R., p. 15.

The proofs of complainant-appellee clearly establish the allegations of the bill in this regard.

In the first place, the fact is to be borne in mind that *complainant-appellee's predecessors, E. Remington & Sons and Remington Standard Typewriter Manufacturing Company, actually bore the name "Remington";* that is to say, the name "Remington" formed a part of and was a salient feature of their corporate names. Such was the fact in 1892, when the complainant corporation was formed by the consolidation of "Remington Standard Typewriter Manufacturing Company" and "Standard Typewriter Company." *It was therefore perfectly natural that the complainant-appellee and its business should continue to be known and designated as "The Remington Company" and "Remington Typewriter Company," etc.*

The testimony fully establishes this fact.

Howard B. Wilson, who had been in the employ of Wyckoff, Seamans & Benedict for 12 years, testified that for several years prior to 1899 he had had charge of the correspondence and mail matter addressed to the appellee, and that "mail matter addressed to 327 Broadway, which is evidently intended for Wyckoff, Seamans & Benedict, is constantly being received as the 'Remington Typewriter Company'; 'Remington Typewriter.'" He also stated that he had observed this fact for "five or

six years." Furthermore, ever since he had been connected with the house, he had observed that in conversation with customers they would refer to Wyckoff, Seamans & Benedict as the "Remington Company," or the "Remington Typewriter Company," or the "Remington Typewriting Company."

R., pp. 235, 236.

Charles Henry Downs in his testimony referred to the complainant-appellee as the "Remington Typewriter Company" and the "Remington People."

R., p. 247.

Albert D. Brown, who said he had been in the employ of appellee and its predecessors at St. Paul, Minn., since May, 1884, testified that letters and communications intended for them were frequently received at said office addressed to "Remington Typewriter," "Remington Typewriter Company," and "Remington Company."

R., pp. 283, 284.

It also appears from the testimony of Silas W. Crandall that a great many letters and communications intended for the Chicago office of Wyckoff, Seamans & Benedict were thus addressed.

R., pp. 288–304, 470–473, 540–543.

Wm. J. McNally's testimony also says that "Remington Typewriter Company" was the ordinary designation of appellee's business in Chicago.

R., pp. 320, 322.

George E. Field, manager of the Indianapolis office of Wyckoff, Seamans & Benedict since Jan., 1885, testified that letters frequently came to that office addressed to "Remington Typewriter Company," and that appellee was often called by that name. He produced sundry envelopes that had contained letters intended for and received by the

appellee which were thus addressed, and appellee was also referred to colloquially as the "Remington People."

R., pp. 336–338, 340, 341.

Andrew J. Scorer, a witness for appellee, who had previously been in the employ of the appellant, referred to the appellee as the "Remington Company."

R., p. 347.

Samuel Weingart, another witness called by appellee, understood the name "Remington Typewriter Company" as referring to it and its business.

R., pp. 511, 513, 515.

Walter M. Scheumaker, a witness for appellee, stated that Mr. Seddon, one of appellant's agents, in conversation with him referred to the fact that a person had called at the store of its agents in New York City and inquired, "Is this the Remington Company?"

R., p. 178.

Richard C. Daniel testified that he had been in the employ of "Remington-Sholes Company" and was in charge of its sales office in St. Louis, Mo., in 1899. That parties sometimes called at their place of business and inquired if that was the office of the "Remington Typewriter Company."

R., pp. 461, 462.

John Culpeper, manager of the office of Wyckoff, Seamans & Benedict in the City of Richmond, Va., testified that complainant-appellee conducted its sales offices and business in Virginia and North Carolina under the name "Remington Standard Typewriter Company."

R., pp. 630, 632.

William A. Catlin, resident manager of Wyckoff, Seamans & Benedict at Kansas City, Mo., testified that a fair percentage of their daily mail came addressed "Remington Typewriter Company," and that appellee was better known to the public as the "Remington Typewriter Concern" than by the name Wyckoff, Seamans & Benedict.

R., p. 534.

George J. Wallau, who had charge of the exhibit of Wyckoff, Seamans & Benedict at the Paris Exposition in 1899, testified that Wyckoff, Seamans & Benedict maintained a large office in Paris, the business being transacted there under the name "Remington Standard Typewriter Company."

R., pp. 612, 616.

Its sales business has been and is so conducted both in this country and in foreign countries.

Numerous exhibits were offered in evidence in this suit showing that complainant-appellee was known to the public and is frequently referred to and addressed as the "Remington Typewriter Company," etc.

R., pp. 860, 861, 868, 932, 936, 937, 938, 939, 940, 942, 944, 947, 952, 953, 954, 956, 972, 988, 989, 990, 991, 992, 993, 994, 995, 996, 998 and 1000.

APPELLANT'S PROOFS ARE TO THE SAME EFFECT.

Mr. Romig, a salesman in the employ of the appellant, added a postscript to a letter written July 19, 1898, by one Seddon on behalf of the defendant and the Remington-Sholes Company, in which complainant is referred to as the "Remington Company."

R., pp. 971, 972.

In his answer to RDQ 135, Romig refers to complainant as the "Remington Company."

Frank L. Sholes, a witness for defendant-appellant, testified that he received at the office of the Remington-Sholes Company in Philadelphia two written communications, one addressed to "Remington & Company" and the other to "Remington Typewriter Company," both which were intended for complainant's Philadelphia office.

R., p. 1201.

J. Franklyn Hobbs, manager of the Chicago branch of the Remington-Sholes Company, testified (R. 1094), I have often heard them (Wyckoff, Seamans & Benedict) called the "Remington People" and occasionally the "Remington Typewriter Company."

M. C. Vance, a witnesss for defendant, being asked if she knew by whom the Remington machine was manufactured, answered: "Wyckoff, Seamans & Benedict, or the Remington Typewriter Company" (R., 1210). Again, in answer to x-Q 49 (R., 1214), she refers to the complainant as the "Remington Company," and in answer to x-Q 50, as "Remington Manufacturing Company."

Thomas O. Parker, a salesman in the office of Page, Dennis & Co., or the Howe Scale Company, 341 Broadway, New York City, from Jan. 1st, 1898, until Sept. of the same year, refers to the complainant as the "Remington Company."

R., p. 1291.

Mr. Joshua T. Gillelan, an agent for the sale of the Rem-Sho typewriter in Baltimore, Md., in 1898, in his testimony refers to the complainant as "The Remington Typewriter Company" and "The Remington Company."

R., p. 1331.

Mr. Wilgus, a salesman in the employ of the Remington-Sholes Company at Philadelphia in 1898, testified that he had been "asked by a number of parties, 'Have you any connection with the Remington Company?' * * *"

R., p. 1347.

It is therefore plain that "Remington Company," "Remington Typewriter Company," etc., were trade names by which the complainant-appelle was known to the public long prior to the filing of the bill herein, and prior to the organization of the so-called Remington-Sholes Typewriter Co. or Remington-Sholes Co.

NAME BY USAGE AND REPUTATION.

A corporation may acquire a property right to the use of a name other than its corporate name as incidental to the good-will of its business.

Goodyear R. Co. *v.* Goodyear Rubber M. Co., 21 Fed. Rep., 277.

Thomas *v.* Dakin, 22 Wend., 9; 1 Cook on Corp., Sec. 15, p. 58; 1 Thompson on Corp., Sec. 286; 7 Enc. Law (2d Ed.), 685; 10 Cyc. Law, 151.

The fact that a corporation may be known and acquire reputation by a name different from its corporate name is referred to and recognized by the New York Court of Appeals in the case of Charles S. Higgins Co. *v.* Higgins Soap Company, 144 N. Y., 462. In that case Chief Judge Andrews (p. 465) observes: "The business was very valuable, and the plaintiff and its predecessor expended, subsequent to 1879, in advertising, the sum of $300,000, and the product was extensively sold in New York and other states and was well known to the trade as 'Higgins Soap,' and *the plaintiff corporation was sometimes known as the 'Higgins Soap Company.'*"

Again (p. 470) the learned Judge says: "But while the plaintiff's name does not describe its business, its product has come to be known to the trade as "Higgins Soap," and to the public the name of the product identified the plaintiff as the manufacturer of this product, *and the company came to be known and called, to some extent, the 'Higgins Soap Company.'*"

In the case of Tuerk Hydraulic Power Company *v.* Tuerk, et al. (36 N. Y. Supp., 384), the plaintiff was known to the trade by the name of "the Tuerk Water Motor Company," which it will be observed was quite different from its corporate name.

To the same effect, S. Howes Co. *v.* Howes Grain-Cleaner Co., 52 N. Y. Supp., 468, 469.

The name "Remington" has been so long, so intimately and *exclusively* associated with the business of appellee and its predecessors, that appellee has become widely and generally known to the public and to the trade, by the name "Remington Typewriter Company" and "Remington Company." **Appellee's business had acquired a worldwide reputation under the trade name of "Remington Typewriter Company" before appellant's principal entered the typewriter field.**

NAME OF COMPLAINANT'S PRODUCT.

The writing machines manufactured and sold by complainant-appellee and its predecessors have for many years been known to the trade and to purchasers and users of writing machines as the "Remington" typewriter, and have been so designated, offered for sale and bought and sold.

The name "Remington" and "Remington typewriter" in the public mind denotes the product of complainant-appellee. That name, long antecedently to the operations of defendant-appellant and the Remington-Sholes Company and its

predecessors, had acquired a secondary meaning or signification, and had become a trade denomination of complainant's writing machines.

The testimony in this case clearly establishes this fact. The trade and the public know appellee's product by that which Judge Lacombe called "the short trade phrase and abbreviated and popular form" of expression (71 Fed. Rep., 169); what the New York Court of Appeals called "the short phrase, between buyer and seller, which indicates the wish to buy and the power to sell" (45 N. Y., 291); what Judge Jenkins, in the Pilsbury case (64 Fed. Rep., 841, 847) aptly terms "catch-words easily retained in memory;" and what Judge Shipman termed, in the Baker case (87 Fed. Rep., 209, 210) "the well known short name by which the public styles the article."

Thomas Richardson testified that "for the first few years, and perhaps until the production of the No. 2 typewriter in 1877, the machine was technically known as the 'Sholes & Glidden,' although, in the general speech of people at Ilion and elsewhere, * * * it was even then more generally spoken of as the 'Remington' typewriter, and in fact I think that very few people knew of any other designation or appellation for that machine."

R., pp. 64–66, 929.

After Wyckoff, Seamans & Benedict and the Standard Typewriter Manufacturing Company acquired the typewriter business of E. Remington & Sons, Mr. Richardson says the machines "were known to the people at large, the users, and generally, if not universally, designated as the Remington or the Remington Typewriter, or the Remington typewriting machines."

R., p. 75.

William K. Jenne, who has been connected with the Remington typewriter enterprise from its incep-

tion, in 1873, says: "At first they (the machines) were quite generally called the Sholes & Glidden machine, but after a time it became known generally as the 'Remington' machine, and I am not quite clear about the date, *but I think it was about 1875; sometime in the year 1875*, when the name Sholes & Glidden was left off the machines altogether, and from that time they have been generally known as the 'Remington' machine."

R., p. 92.

Thomas F. Crean stated that he had been acquainted with the machines manufactured by the complainant and its predecessors for upwards of 15 years, and had never known them to be called or designated by any other term or name than "Remington" machine; "that is 'Remington No. 2,' or 'Remington No. 6;' sometimes where a particular model was being referred to, following the word 'Remington' by the number of that model, but always by the term 'Remington.'"

R., p. 120.

He produced 165 applications made to complainant-appellee for positions by stenographers and typewriter operators, in 153 of which the word "Remington" was used in designating the machine they operated, *and 10 of said applicants used the abbreviation "Rem."*

R., p.121.

He also produced sundry letters, from the files of appellee wherein the machines were referred to as "Remington," and numerous catalogues and publications, wherein the complainant's machines were designated as the "Remington." *Among others, a letter addressed by the London dealer to Wyckoff, Seamans & Benedict in Feb., 1884, at the head of which was printed or engraved, "Remington Typewriter Depot, 6 King St., Cheapside, London, E. C."*

Many other publications, letters, etc., were produced by Mr. Crean, wherein appellees machines were referred to as the "Remington," or "Remington typewriter."

R., pp. 124–128.

Joseph E. Platt had been engaged in the sale of typewriting machines for about 11 years at the time he gave his testimony in April, 1899. He stated that the machines manufactured by the complainant and its predecessors, and whose machines he sold from 1888 to 1898, were known, designated and spoken of in New Haven, and in other places in the State of Connecticut, as the "Remington typewriter."

R., p. 141.

Robert M. Johnston, a typewriter salesman for Wyckoff, Seamans & Benedict in the City of Philadelphia, canvassed that city in Jan., 1899, calling at sundry offices and places of business therein, for the purpose of inquiring what typewriting machines were used. In most instances he ascertaind that the persons or corporations—about 100 in number—upon whom he called used the appellee's product, which in most instances they designated as the "Remington."

R., pp. 148–165.

Harry W. Conant, of Cambridge, Mass., canvassed the City of Boston for the purpose of ascertaining what typewriting machines, if any, were in use in the offices and places of business which he visited, and for the purpose of learning by what names the machines in use were called by the owners or users thereof. He visited 132 offices, where in response to his inquiry as to what typewriter they used, he was informed that they used the "Remington," or "a Remington," or "Remingtons," and in one place the reply was "a Standard, and is not the Remington the Standard."

R. V. I., pp. 165–169.

Byron A. Brooks testified that the machine first manufactured by E Remington & Sons was called "The Typewriter," or the "Sholes & Glidden typewriter." That the machine was sold under the name of "The Typewriter" until about 1879 or 1880, when other machines began to come upon the market and it was thereafter called the "Remington" to distinguish it from other writing machines. Since 1880, machines manufactured by complainant's predecessors and by complainant have been known as the Remington No. 2, etc.

Brooks further stated that *he had often heard operators and salesmen speak of the machine as the "Rem," or as "No. 2 Rem," when asked what machines they were using.*"

R., p. 190.

Howard Spelman, a salesman in the employ of appellee, canvassed the City of New York in December, 1898, and Jan., 1899. He visited various offices and places of business in said city for the purpose of learning how complainant's machines were designated by the trade, by second-hand dealers and merchants, and copy offices. He visited 101 business places in all. The result of his inquiry was, that in each case, the second-hand dealer and the offices and places of business, which he visited, designated appellee's machine as "Remington" or "The Remington."

R., pp. 201-204.

Walter J. Barron, an early inventor in the typewriter art, has been connected with the improvement, manufacture and sale of writing machines since about 1871, and is familiar with the history, development, manufacture and sale of appellee's machines. He testified that since about 1878 the machines manufactured by appellee's predecessors and by it were called the "Remington" typewriter, and had been so known to the public. After the "Caligraph" was put upon the market—about

1880—*it was frequently designated by operators and by salesmen, simply, as the "Rem,"* and when the word "Remington" was used it was intended to convey the idea simply, that it was a "Remington" typewriter.

R., pp. 206, 207.

Robert McKean Jones, testified that he was in the service of appellee for nine years prior to May, 1899, and for the greater part of that time he had been in charge of their advertising department. *He produced numerous publications, magazines, catalogues, etc., in which appellee's machines and those of its predecessors were advertised designated and referred to as the "Remington" and "Remington typewriter."*

R., pp. 210–232.

Charles H. Cook, of Chicago, examined the files of the *Chicago Tribune* in Feb., 1899, for the year 1892, and to the year 1898 inclusive. He looked over the advertising circulars of the *Sunday edition only*, under the headings: "*Situations wanted*—Stenographers; male. *Situations wanted*—stenographers; female. *Help wanted*—stenographers; male. *Help wanted*—stenographers; female; typewriters." He examined the files for the period mentioned to ascertain how many times the "Remington" machine was referred to under those classified headings. *He counted 8,210 advertisements in which the word "Remington" occurred, and 813 advertisements in which the word "Rem" was used.* The words "Remington" and "Rem" occurred as follows:

1892 "Remington" occurred 1,247 times; "Rem" 29 times.

1893 "Remington" occurred 1,301 times; "Rem" 30 times.

1894 "Remington" occurred 966 times; "Rem" 43 times.

1895 "Remington" occurred 1,240 times; "Rem" 111 times.

1896 "Remington" occurred 1,277 times; "Rem" 120 times.

1897 "Remington" occurred 1,146 times; "Rem" 176 times.

1898 "Remington" occurred 1,033 times; "Rem" 304 times.

These advertisements were inserted by persons desiring to obtain positions as stenograpers and typewriter operators, by firms desiring to employ such persons, and by people having for sale or wishing to buy writing machines.

R., 272-275.

Wm. H. Harmon, in the employ of appellee at its Chicago office, testified that his chief duty was to supply business men with stenographers. He produced sundry applications of persons for positions as stenographers, etc., covering the years 1897, 1898 and 1899. He stated that he had examined said applications for the purpose of determining what percentage of the applicants for positions used the abbreviation "Rem," and what percentage thereof the word "Remington." *For the period beginning June, 1897, and ending February, 1899, he found that of 4,101 applicants for stenographic positions within that period 3,806 used the word "Remington." One used the word "Reming"; two used "Rem St'd"; 9 used "Rem No. 2"; 8 used "Rem No. 6," and 275 used "Rem."*

R., pp. 275-278.

John S. Bayes, a typewriter salesman in the employ of appellee, who had been soliciting and selling typewriters since 1892, testified that appellee's machines were known to the trade and among purchasers and users of typewriters in Chicago as the "Remington" and the "Remington typewriter."

R., p. 279.

Albert D. Brown stated that appellee's machines were known in the trade and by purchasers and users in St. Paul, Minnesota, as the "Remington typewriter."

R., p. 283.

Silas W. Crandall, general manager of appellee's Chicago office since 1883, testified that the machines manufactured and sold by the appellee were known in the trade and to purchasers and users thereof, within the territory under his management, as the "Remington."

R., pp. 288, 289.

Eugene A. Conyne, salesman of the appellee in the City of Chicago since 1892, testified that appellee's machines were known by almost everybody as the "Remington typewriter."

R., pp. 312, 313.

Donald McKay, another salesman had been in the employ of appellee for about 10 years. He testified that appellee's machine was generally known and designated in the trade and by purchasers of writing machines as the "Remington" typewriter.

R., p. 316.

Wm. J. McNally, city manager of appellee's Chicago office, stated that appellee's machines were generally known and designated in the trade and among purchasers and users as the "Remington." He said he had never heard the machine called anything but the "Remington."

R., pp. 320, 321.

Oscar W. Kotchtitsky, in January, 1899, canvassed offices and places of business in the City of St. Louis for the purpose of learning how the machines made by appellee were commonly known and designated.

He visited 38 offices and places of business, and in every instance where the appellee's machine was used it was designated as "The Remington" or the "Remington typewriter."

R., pp. 329–336.

George E. Field, manager of appellee's Indianapolis office for many years, testified that the machines manufactured and sold by appellee were generally known in the trade, and among purchasers and users of writing machines in and about Indianapolis, Ind., as the "Remington."

R., pp. 336–337.

John F. Soby, manager of complainant-appellee's Philadelphia office, stated that the machines of appellee were generally known and designated in the Philadelphia market, and among purchasers and users of such machines as the "Remington."

R., pp. 493, 494.

Bruce L. Holton designated complainant's machines, which he was engaged in selling at St. Joseph, Mo., as "the Remington typewriter."

R., p. 522.

Wm. A. Catlin, resident manager of appellee's office at Kansas City Mo., also designated appellee's machines as the "Remington typewriter."

R., p. 530.

J. Franklyn Hobbs referred to complainant's machines, in his testimony, as the "Remington typewriter" and "Remington machine."

R., pp. 552, 553.

John F. McClain testified to the extensive sale and use of complainant's machine in Europe, and to the fact that it was generally known as the "Remington."

R., pp. 607–610.

Sundry exhibits showing that appellee's machines, for many years, have been designated "Remington" and sometimes "Rem," will be found in R. pp. 849-855. *Scribner's Magazine for August, 1881, Harper's for January, 1882, and the Century for February, 1882, contain advertisements inserted by E. Remington & Sons in which the name "Remington" is employed in connection with the word "Perfected" as a designation for their machines.*

R., pp. 855, 857, 929.

The further fact is to be noted, in this connection, that in October, 1888, appellee's predecessor "Standard Typewriter Manufacturing Company" registered in the United States Patent Office the name "Remington" as a trademark for its writing machines, stating that it had continuously used the same since about March, 1886, and that its predecessor E. Remington & Sons, whose entire right, title and interest in the typewriter business it then held by purchase, had used the same, since the forepart of 1880.

R., pp. 788-792.

This fact is admitted by the defendant-appellant in its answer.

R., p. 20.

The defendant-appellant in its answer while denying that the purchasing public and the trade relies upon the words "Remington typewriter" to distinguish complainant's machines, admits that they are sometimes so spoken of, or referred to.

R., pp. 18, 19. Subdivision V.

A complete answer to defendant-appellants' contention in this regard is found in United States Letters Patent No. 629,438, dated July 25, 1899, issued to Mr. C. N. Fay, president of the "Remington-Sholes Company," on an application filed

Jan. 13, 1897, for improvements in ribbon feed mechanism for typewriting machines. The application was prepared by the defendant-appellants' counsel in this case, and sworn to by Mr. Fay. In said application complainant-appellee's writing machine is referred to as the Remington No. 2 machine.

R., p. 858.

Defendant-appellants' witness **Romig** in his testimony designates complainant's product as the "Remington machines."

R., pp. 1118, 1134, 1135.

Appellants' witness **Russel** refers in his testimony to complainant's machine as "the old Remington," and the "Remington."

R., pp. 1147, 1148.

Appellants' witness, **Alexander Clement,** in his deposition, refers to the appellee's machine as the "Remington typewriter."

R., p. 1310.

Mrs. Vance, a witness for appellant, referred to appellee's machine as the "Remington."

R., pp. 206, 209, 211, 214, 215.

Williams, one of appellants' witnesses, also called appellee's machine the "Remington."

R., pp. 1221, 1222, 1223, 1224.

McNaugher spoke of appellee's machine as the "Remington."

R., p. 1227.

Defendant-appellants' witness, **Alkire,** designated appellee's machine as the "Remington typewriter."

R., p. 1243.

Thomas O. Parker, a salesman of appellant, testified that when Weingert called at appellant's store to purchase a typewriter, he inquired whether they had a "Remington machine," thus showing that the purchasing public so designate appellee's product.

Parker himself designated appellee's machine as the "Remington."

R., pp. 1280, 1283, 1284, 1287, 1288, 1292, 1294, 1295, 1296.

Joshua T. Gillellan, a witness for appellants, designated the appellee's machine at the "Remington."

R., p. 1330.

Appellants' witness, **John E. Kunkle,** designated appellee's machine as the "Remington."

R., p. 1364.

Appellants' witness, **Joseph A. White,** of Chicago, called appellee's machine the "Remington typewriter." *He stated that they frequently used the contraction or abbreviation "Rem" for Remington, in their business, and that this practice, of thus referring to appellee's machine, was quite general.*

R., pp. 1426, 1427.

The defendant-appellant, in its answer, sought to controvert the fact that complainant appellee's product had been for many years referred to, *known and designated as the "Remington" and "Remington typewriter," but wholly failed to make any proof in support of its allegation.*

While it is true that complainant-appellee has used the word "Standard," more or less in its advertisements and upon its machines, in connection with the word "Remington," nevertheless the proofs herein show that the words "Remington Typewriter" constitute a designation, or "short trade phrase," by means of which appellee's pro-

duct was and is identified, and that they were and are employed by the trade and the public to distinguish its machines and to effect the purchase and sale thereof. **In fine, by long use, in connection with appellee's product, and business the name of "Remington" has acquired a secondary meaning as denoting the machines of the complainant-appellee, and such was the fact when the Remington-Sholes machines were first put upon the market.**

Montgomery *v.* Thompson, 41 C. D., 35; A. C. (1891), 217.

Wotherspoon *v.* Currie, L. R., 5 H. L., 508.

Reddaway *v.* Banham (1896), A. C. 199.

Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. N. S., 271.

Elgin Nat'l Watch Co. *v.* Ills. Watch Co. 179 U. S., 665.

ERRORS ALLEGED IN THE DECREE OF THE COURT BELOW.

The Court below found, *inter alia:*

1. That since about the year 1873 the complainant and its predecessors have been engaged in the manufacture and sale of typewriting machines, which became well and favorably known and were marked and designated as "Remington machines."

2. That said writing machines were put upon the market by complainant and its predecessors, and introduced, advertised for sale and popularized, in this country and in foreign countries, under the name of "Remington" and "Remington Typewriter," by which names they came to be widely known and identified by purchasers and the public, and which before the acts of the defendant and its principal, Remington-Sholes Company, in the bill

of complaint mentioned, had been continuously and exclusively used to designate and identify complainant's machine.

It is asserted by the defendant-appellants that the Court below erred in thus holding and finding. (See Assignment of Errors, 1, 2, p. 1509.)

FIRST ALLEGED ERROR.

The proofs established the fact that E. Remington & Sons began the manufacture of the model machines early in the year 1873, and that in 1874 their writing machines were upon the market.

R., pp. 40, 41, 44, 46, 61, 88, 95, 97.

The finding of the Court below was that the manufacture and sale of machines had been carried on "since *about* the year 1873." There is no doubt but that the machines became well and favorably known long prior to 1893.

R., pp, 72–74, 95, 96, 97, 237.

The machines were marked with and designated by the name "Remington."

R., pp. 64, 81, 83, 91, 103, 104, 190, 206.

The finding of the Court below does not import that the machines were *marked with or designated by the name "Remington" in the year 1873*, but only that the manufacture of machines began *about* 1873, and that they were subsequently marked and designated as "Remington machines." Moreover the question is one of *time* only, and is of no force in this case, since the facts found by the Court were undoubtedly true when the Remington-Sholes machine first came upon the market. As said by the learned counsel for the defendant-appellants, in their brief in the Court below: "When the Remington-Sholes Company and its predecessor entered

the field, complainant had a world-wide reputation." Obviously that reputation was acquired in the manufacture and sale of the "Remington Typewriter," and not otherwise.

SECOND ALLEGED ERROR.

The proofs herein also show that the appellee and its predecessors introduced and advertised for sale, both in this country and in foreign countries, its machines, under the name and style of "Remington," and "Remington typewriter," and that by these designations appellee's product came to be widely known and identified by purchasers and the public.

R., pp. 52, 53, 54, 64, 65, 66, 75, 76, 92, 95, 97, 190, 207, 210, 211, 222–226, 229, 273, 274, 323, 849–857, 858, 875, 879.

Furthermore, it is perfectly clear, from the record in this cause, that *prior to the infringments alleged in the bill*, these designations had been continuously and exclusively used to designate and identify appellee's machines. Those parts of the record heitherto cited abundantly prove appellee's contention.

Moreover, there is no force in appellant's suggestion, that appellee's machines were not and are not known as the "Remington," but that its product was and is known to and indentified by the public by the designation "Remington Standard." Manifestly this is not so, inasmuch as appellants have proven herein that the word "Standard," when used in connection with a typewriter, does not point to or indicate its origin, or denote that it is the product of any particular maker.

R., 1016, 1034, 1085–1089.

It, therefore, follows that the name "Remington" indentifies appellee's machines and that the Court below did not err in respect to the first and second findings of fact set forth in its decree.

APPELLANT HOWE SCALE COMPANY OF 1886.

This company is the *nominal* defendant and appellant in this case (*the real defendant and appellant being the "Fay-Sholes Company"*), a corporation created under and by a special act of the Legislature of the State of Vermont, passed and duly approved November 24, 1886.

R., pp. 1, 16.

This corporation became the general sales agent of the "Remington-Sholes Company"—now Fay-Sholes Company—in 1897, in and for the United States, and sold the "Remington-Sholes" typewriter, or "Rem-Sho" typewriter, through its various agencies and offices, and especially in the cities and localities referred to in the bill of complaint.

R., pp. 8, 27, 28.

Shortly before final hearing in the Court below, it discontinued the sale of the Remington-Sholes typewriter through certain of its agencies, but it did not wholly cease to sell said machines until the entry of the decree herein.

The Howe Scale Company admits in its answer that it advertised for sale and sold said machines as the agent of the Remington-Sholes Company and as "Remington-Sholes typewriters," after the first day of May, 1897, and prior to the filing of the bill of complaint in this action.

R., pp. 27, 28.

The fact that the Howe Scale Company discontinued the sale of these machines through certain of its agencies, or even if it were a fact (which it is not) that it had wholly discontinued the sale of said machines after the suit was commenced and

before the entry of the decree, did not disentitle the appellee to the relief granted.

Oxford University *v.* Wilmore-Andrews Pub. Co., 101 Fed. Rep., 443.
Clark Thread Co. *v.* The William Clark Co., 37 Atlantic Rept., 599.
Burnett *v.* Hahn, 88 Fed. Rep., 694.

GRAVAMEN OF THE BILL.

The bill of complaint, after setting forth the history of the complainant company and its rights and interests as regards the use of the name "Remington," in connection with its typewriting machines and business, and after setting forth the fraudulent acts of the Remington-Sholes Company and its corporators in the selection and use of the name "Remington," charges that the Howe Scale Co. was fully cognizant of all the rights of the complainant-appellee as set forth in the bill, and of the fraudulent purpose and intention of the incorporators of the Remington-Sholes Company, in the selection and adoption of said corporate name and the use thereof, and of the intent and purpose of said corporation in the selection, adoption and use of the names "Remington," "Remington-Sholes," and "Rem-Sho" upon and in connection with the sale of its typewriting machines, and in advertising for sale, offering for sale and selling the same in the manner as charged in the bill of complaint; and the bill further avers that said defendant company, being animated by the same motives as the Remington-Sholes Company, designated, advertised, offered for sale and sold without complainant's consent and with intent as charged, large numbers of typewriting machines in sundry states and cities mentioned in the bill of complaint.

R., pp. 1-9.

In other words, the bill charges that the Howe Scale Co. and the Remington-Sholes Co. were and are co-conspirators and joint tortfeasors in the premises.

The appellant, Howe Scale Company, in and by its answer, justifies all its acts in the premises under the alleged right and title of the Remington-Sholes Company, its principal, which is primarily liable, and which it admits has assumed the defence of this action, has paid all the expenses of the defence thereof, and has indemnified and agreed to save the Howe Scale Company harmless as to all matters relating to or growing out of this litigation.

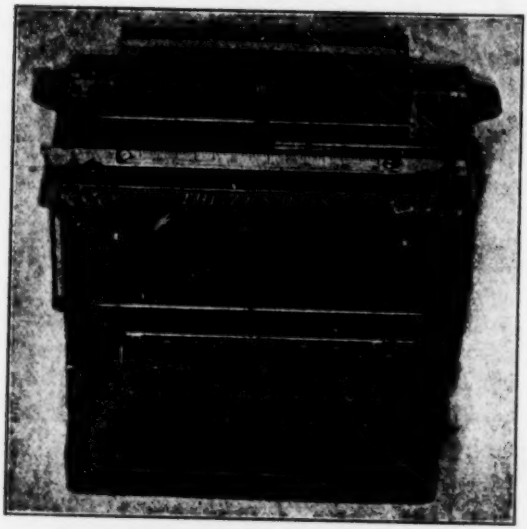
R., pp. 926, 1358.

HISTORY OF THE REMINGTON-SHOLES OR REM-SHO TYPEWRITER AND THE REMINGTON-SHOLES COMPANY AND ITS PROMOTERS.

In or about the year 1892, one Zalmon G. Sholes, of Evanston, Illinois, previously residing at Milwaukee, Wisconsin, made a model typewriting machine which he designated **"The Z. G. Sholes" typewriter.** It was a working model. *This model was destroyed by fire and another one was subsequently constructed on the same general lines in the winter of the years 1892-93.* A photograph of the model machine, which was constructed in the winter of 1892-93, p. 8, is in evidence in this case, *designated "Complainant's Exh. Photograph Z. G. Sholes Machine." R., p. 930.* It is here reproduced.

This photograph was taken in March or April, 1893.

Complainants' Exhibit—Photograph Z. G. Sholes Machine.



After Sholes built the first model other persons acquired a pecuniary interest in it, and in applications for certain alleged improvements embodied therein. Sholes had filed applications for patents for certain features in this machine in 1891. One Smith and one Mulliken became interested in the model in 1892. It was then known as **"The Z. G. Sholes"** typewriter. Smith and Mulliken owned a three-quarters interest in this model and in the inventions therein, and Sholes owned the other one-quarter. Two other persons—Wadhams and Camp—became interested about April, 1893. *In or about April, 1893, Camp, Wadhams, Smith and Sholes organized a corporation under the laws of the State of Wisconsin, under the name and style of* **"The Z. G. Sholes Company."** The capitalization of the company was at first $10,000 but was subsequently increased to $100,000. *The purpose of the*

organization of this company was to manufacture and sell a typewriting machine similar in structure to **"The Z. G. Sholes"** *model. This machine was named for "Z. G. Sholes" because he invented that which was novel in it. The corporation was also named for Sholes because it was deemed best by the corporators to give the company the name of the inventor. The names of his associates who held three-quarters of the stock were not employed as a part of the corporate name. The name* **"The Z. G. Sholes"** *was painted on the top plate, at the front of the model, and in a conspicuous place so as to be readily observed by the eye.* See cut above.

R., pp. 390, 391, 392, 397.

After **"The Z. G. Sholes Company"** was formed machinery was purchased with which to manufacture tools to build typewriters like said model, which machinery was installed in a shop at Chicago. After starting on the tools and running for a few months, bank failures occurred in Milwaukee, and Messrs. Camp and Wadhams decided not to proceed with the undertaking, as they feared they could not raise the required amount of money to carry on the business, owing to the then existing panic (R., 400-2). Camp and Wadhams having withdrawn from the enterprise, Sholes sought to interest others in his model machine, and was introduced to one Carver Remington, who, with his brother Franklin Remington, became financially interested in the machine. **Messrs. Carver and Franklin Remington were at that time associated together in a contracting business in the City of Chicago, excavating on the drainage canal.** The two Remingtons acquired the three-quarters interest previously held by Smith, Mulliken, Camp and Wadhams about August, 1893. *On the 26th day of August, 1893, they entered into an agreement with Sholes, which is in evidence in this case, and is marked "Complainant's Exhibit, Sholes-Remington agreement, August 26, 1893"* (R., pp.

825–827). Under this agreement Sholes and the Remingtons became jointly interested in the machine, applications for patents, and the stock of the **"The Z. G. Sholes Company."** The Remingtons and Sholes endeavored to interest capitalists in **"The Z. G. Sholes"** model of a writing machine, and to that end exhibited the model to a good many people. Prior to the time when the Remingtons acquired their interest in the Sholes model, etc., *Sholes had been negotiating with and endeavoring to sell the same to Mr. Seamans, of Wyckoff, Seamans & Benedict.* After the Remingtons acquired their interest, and in the fall of 1893, they came east with Sholes, visiting Utica, New York, and New York City, and endeavored to interest the "Remington Arms Company" of Ilion in the manufacture of typewriters like said model.

The Remingtons acquired their interest in "The Z. G. Sholes" typewriter for speculative purposes, and the visit to Ilion and to the Remington Arms Company's works was for the purpose of *creating a stir* and selling the model machine, if opportunity offered. The object of the visit was, also, to make Mr. Seamans and others, connected with the Remington typewriter enterprise, *a little anxious*, and to induce them to purchase the model and the alleged improvements embodied therein. The model machine was taken along on the eastern trip, and shown to a great many persons at Ilion, where appellees' works are located, and elsewhere.

R., 404, 405, 414, 415.

At the time of this visit to Ilion, the model machine was then known, designated and marked as "The Z. G. Sholes." About November, 1893, and after the purpose of the eastern visit had failed, the name of the machine was changed from "The Z. G. Sholes" to "Remington-Sholes." At the time of such change the Remingtons and Sholes were endeavoring to interest, and afterwards did interest, certain Chicago capitalists therein.

R., 417, 418, 425, 426.

The Remingtons purchased their interests in the model, etc., for eight or nine thousand dollars, and, in addition to this sum, they allege that they paid out and expended (to Sholes and to a mechanic, who made some slight changes in the model, for travelling expenses, in endeavoring to interest capital therein, shop rent, attorneys' fees, etc.) an additional sum, amounting in all to about $15,000.

R., pp. 412, 413.

At the time the name of the model was changed from "**The Z. G. Sholes**" to "Remington-Sholes," Sholes testified that he realized his association with the Remington boys was a good combination; and *that the idea grew upon him that in view of the association of the name Remington with the typewriter business*, it was a happy combination; **that he realized that it was a good combination in view of the fact that there had been a machine upon the market in connection with which the name "Remington" was used; that if the names of Messrs. Remington had been Smith or Peterson he would not have changed the name of his model. He always thought that the name "Remington" in connection with his model was of value; that he thought it would be an advantage in the sale of his machine to have it sold under the name "Remington-Sholes," and that he thought the name "Remington" a valuable addition to his name because the name "Remington" had been used in connection with another business and another typewriting machine.**

R., pp. 424–427.

Sholes, magnanimously took upon himself the responsibility for the change of the name of the model, but as counsel for the appellant said, in the Court below, *it was surprising* that he should have done so without their knowledge. His statement in this regards seems incredible in view of the fact that the so-called "Remington boys" were at that time part-owners and jointly co-operating with him

in an endeavor to interest capital in this model. Moreover the Remington's ratified the change and *they were all parties to the frudulent scheme of changing the name of the model and attaching thereto one that had for many years been associated with a writing machine of world-wide reputation, then manufactured and sold by complainant-appellee.*

The change of name was both unnecessary and improper, and the motive and intent therefor were manifestly to avail of the established reputation of appellee's writing machines.

The contention of appellants that at the time the name of the model was changed, Sholes and the Remingtons had labored together for many months and had reconstructed the model machine, is incorrect, as the proofs show that the Remingtons did not acquire their interest in the model until about the 26th day of August 1893 (R., pp. 824–825) and the name was changed about November, 1893 (R., p. 417) and shortly after they returned from their Eastern trip. The labor alleged to have been performed by them consisted, principally, in the journey to Ilion, N. Y., to sell the model, etc., as heitherto stated, and covered a period of two or three months. During that time and prior to the organization of the Remington-Sholes Typewriter Company, hereafter refered to, the model was not "*reconstructed*," as the proofs show that no material or substantial changes were made therein. Furthermore prior to the time of the organization of the Remington-Sholes Typewriter Company, that is prior to May 1894, no writing machine was built by the Z. G. Sholes Company, and none was ever constructed by the Remingtons and none by Sholes, except the model destroyed by fire, and the one constructed by him, which furnished the basis for the organization of the Remington-Sholes Typewriter Company.

R., pp. 390, 400, 401, 405, 414, 416, 417, 419, 427.

Judge Lacombe, speaking for the Circuit Court of Appeals was entirely right when he said: "In November, 1893, the name of the machine was changed from the 'Z. G. Sholes' to the 'Remington-Sholes,' that is to say the name of the model was changed, and the parties interested began to talk of the machine as the 'Remington-Sholes,' but no such machine had apparently been manufactured and offered for sale."

In another part of his opinion the same learned Judge observed: "Some suggestion has been made that the machines existed before the incorporation; that they were produced by the Remingtons and Sholes individually at the time when the Remingtons had gone into the typewriting business with Sholes on their own account and had a right to sell their goods under their own name. The record is very voluminous, and we may have overlooked some item of proof, but a careful examination of it does not sustain this proposition. Prior to the formation of the Remington-Sholes Typewriter Company, no machines had been sold or offered for sale. Two (2) or more had been made as models, and the name on one of them (the second one constructed) was changed from the 'Z. G. Sholes' to the 'Remington-Sholes,' but they had not become associated with the machine except in the talk of the future corporators among themselves; the public knew nothing of any such name in connection with the typewriter, indeed did not know the junior Remingtons or even Sholes as a producer of typewriters."

GENESIS OF REMINGTON-SHOLES TYPEWRITER CO.

About six months after the Remingtons acquired an interest in "The Z. G. Sholes" model machine, and shortly after the change of its name, Franklin H. Head and Charles Norman Fay, two large capitalists, became interested therein, and Mr. Fay, in or about the month of April, 1894, entered into an arrangement with Sholes and the Remingtons whereby he became the chief promotor of the enterprise. In the month of May, 1894, Fay and his associates, Remingtons and Sholes, caused a corporation to be organized under the laws of the State of Illinois, under the name of "Remington Sholes Typewriter Company." This company was created with a capital stock of $150,000, that is 1500 shares of stock, each share being of the par value of $100. Beyond question the corporate name was selected by Fay and his associates with full knowledge of the fact that the name "Remington" was one that had long been extensively and exclusively used in connection with appellee's writing machines and business. Counsel for appellants admitted in their brief in the Courts below that "Doubtless Mr. Head and Mr. Fay (corporators) also agreed with Mr. Sholes that the name 'Remington-Sholes' was 'a good combination.' It offered a 'talking point' for that machine." "The choice was an intelligent one." The subscribers to the capital stock were Z. G. Sholes, 374 shares, Franklin Remington, 561 shares, Carver Remington, 562 shares, and Norman Hapgood, 1, Charles H. Hamill, 1, and Leverett Thompson, one share. *No cash was actually paid for the stock, which was subscribed for by Sholes and by the Remingtons, but the whole capital stock was made full paid by turning in the model machine, etc., to the company therefor. The stock was afterwards divided between Sholes, the Remingtons, Fay and Head. Fay received $50,000 worth of the stock for his services as pro-*

moter. The first Board of Directors, selected in and by the Articles of Incorporation, consisted of Charles N. Fay, Franklin H. Head, Charles S. Holt, William P. Sidley, Charles H. Hamill, Norman Hapgood and Leverett Thompson. The names of Sholes and the Remingtons did not appear in the first Board of Directors, but they subsequently became directors of the Company. After the organization of said Company, the capital stock was increased to $250,000.

R., pp. 406–409, 828–835.

The Remington-Sholes Typewriter Company, being organized, leased a small factory, purchased machinery, with which to build tools to turn out the machines, the first of which was marketed about December, 1894. The machines as manufactured and sold were in structure and mode of operation substantially like **"The. Z. G. Sholes"** model, which was *wholly* the invention of Sholes. Neither of the Remingtons had previously been in the typewriter business or made any inventions or improvements in typewriters.

R., pp. 58–60, 100, 101, 390, 410, 412, 417.

This Company continued to manufacture and sell writing machines designated as the "Remington-Sholes" typewriter, until about December, 1896. During that period it manufactured several hundred machines, some of which were sold in the United States and some in foreign countries.

R., pp. 410, 411, 420, 438.

Fay and his associates well understood the value of the name "Remington" when they organized the so-called "Remington-Sholes Typewriter Company"; that they did, is clearly manifest from the testimony of F. Lyman Browne, who had an interview with Fay in New York City in the summer of 1894, in regard to taking the agency for the sale

of the so-called "Remington-Sholes" machine. Fay then referred to the fact that the name "Remington" would be of material assistance in selling the machine.

R., p. 447.

This was shortly after the company was organized and before any machines had been made, advertised or sold, and before the company had obtained any business or the good will of any business.

Sholes testified that in the latter part of the year 1895, Fay remarked to him that he had paid too much for the machine as *the only value he attached to it was the name "Remington-Sholes."*

R., p. 419.

Fay and the other corporators regarded the name as "a most valuable asset."

R., p. 23.

Obviously the valuable part of this hyphenated name was the word "Remington," which suggested to purchasers of machines the "Remington concern whose name was a 'by-word for good workmanship the world over.'"

RE-ORGANIZATION AS REMINGTON-SHOLES CO.

In November, 1896, Remington-Sholes Typewriter Company, having become largely indebted, principally to Fay, an attempt was made to devise a plan of finance which would relieve the company from its then pressing indebtedness, and the plan not being ratified and confirmed by the stock-holders, it was, at a special meeting of the stock-holders, voted to wind up the company's business, sell its assets, surrender its charter, etc., which accordingly was done. The assets were purchased by Fay, who was president and principal creditor and stock-holder of

that company, *as Trustee for himself and other stock-holders*, for the sum of $51,188.69, that amount being just sufficient to pay all corporate debts. Fay purchased the property for the purpose of re-organizing the business, and thereafter devised a plan of re organization whereby the stock in the new company was to be allotted amongst the old stock-holders in keeping with the amounts of cash actually invested by them in the Remington-Sholes Typewriter Company. Fay ran the factory for a few months and until he had completed his scheme of re-organization. During that time he manufactured the machines at the same place, and sold them as theretofore under the name "Remington-Sholes" typewriter.

R., pp. 410, 411, 431, 435, 835, 843, 1355, 1356.

In April, 1897, Fay re organized the old company and business by incorporating a new corporation under the name **Remington-Sholes Company** to take over the property and assets *which he had purchased and temporarily held as Trustee for himself and other stock-holders of Remington-Sholes Typewriter Co.* The capital was fixed at $300,000, that is to say, 3000 shares of the par value of $100 each. The subscribers to the capital stock were Fay and others. Several of the subscriptions were made merely for the purposes of organization of the company, as for example, Franklin Remington's, *who subscribed for 500 shares of stock for the purpose of organization only.* He ultimately received only 150 shares ($15,000 worth) of the *common* stock. The stock of the Remington-Sholes Company appears to have been divided into preferred and common shares, the common stock being issued to subscribers, the pretended consideration therefor being the procuring a good title to the property theretofore used by Fay and the Remington Sholes Typewriter Company.

R., pp. 567, 411, 413, 420, 430, 835–842, 843–849, 1356.

Thus it is manifest that the sale of the property and assets of the Remington-Sholes Typewriter Company, and the purchase thereof by Fay and the organization of the new corporation—Remington-Sholes Company—were simply part of a scheme of re-organization evolved by Fay and others for the purpose of liquidating the indebtedness of the old concern. Sholes and Carver Remington were not included in the re-organization scheme. *To Franklin Remington a small amount of stock was donated*, and he was still called, general manager of the business, to furnish *a colorable excuse* for the company's use of the name "Remington." *His interest was only nominal.*

The new or re-organized company admittedly stands in the shoes of the old one and is but a continuation of the original *fraudulent scheme* by substantially the same parties. Under the pleadings and proofs the fraudulent character of the old as well as the new corporation was in issue. The Howe Scale Company has sought to justify its wrongful acts under a pretended right and title derived from the Remington-Sholes Typewriter Company, C. N. Fay and the Remington-Sholes Company.

R., pp. 21-25, 406-420.

The Remington-Sholes Company continued to manufacture the same machine, theretofore invented by Sholes, with the addition of a few minor improvements, made by Fay. The designation of the machine "Remington-Sholes," was *abbreviated or shortened* to "Rem-Sho," which was the abbreviated Telegrapic Code address, theretofore adopted and used by the "Remington-Sholes Typewriter Company." All machines and advertisements, however, bore the name "Remington-Sholes," and the name "Rem-Sho" was and is understood by the trade and the public to be *merely an abbreviation* of the name "Remington-Sholes." Since the organization of the Remington-Sholes Company, now

Fay-Sholes Company, it has continued to manfacture typewriting machines and to sell them, both in this country and in foreign countries; that is to say, *in the same localities and countries* where the complainant's machines have been, were and are offered for sale, sold and used.

ZALMON G. SHOLES.

Mr. Sholes is the son of one C. Latham Sholes whose improvements in typewriting machines were embodied in what came to be known as the Remington No. 1 typewriter. This machine as already stated was at first designated the "Sholes & Glidden" tywewriter; C. Latham Sholes and Carlos Glidden, being the originators of the principal improvements embodied therein. It was subsequently greatly changed and improved, and after about 1877 or 1878, when the Remington No. 2 machine was put upon the market *it could not truthfully be said that Zalmon G. Sholes' father was the inventor or even the principal inventor of the "Remington" typewriter.* This is clearly proven by the evidence and exhibits in this case.

R., pp. 857-858.

Zalmon G. Sholes first turned his attention to the making of improvements in typewriting machines about 1891, and thereafter, as we have already seen, he produced a model of a writing machine which was called **"The Z. G. Sholes,"** but was afterwards christened and subsequently manufactured and sold as the "Remington-Sholes" and "Rem-Sho" typewriter. *As the inventor and designer of that model it was naturally designated "The Z. G. Sholes," and a company organized for the manufacture thereof under the name and style of "The Z. G. Sholes Company."* Sholes, as we have already seen, participated in the organization of the Remington-Sholes

Typewriter Company, but after his improvements had been secured and the business was reorganized as the Remington-Sholes Company, his services were not deemed of sufficient importance to continue him either as a stock-holder or as an employee of the company.

R., pp. 42, 43, 55, 64, 90, 102, 205, 390, 391, 411, 843, 849.

Z. G. Sholes' father was never engaged in typewriter manufacture, and his only experience prior to the construction of this model in 1892, was in the Remington factory at Ilion in 1883. He worked there for a short while without compensation.

R., p. 441.

Manifestly "Remington" was the name of value and the word "Sholes" was suffixed thereto in order to introduce a colorable variation which might supply the infringers with a plausable excuse for their fraud.

CARVER REMINGTON.

Carver Remington, who purchased three-eighths (⅜) interest in **"The Z. G. Sholes"** model, and was one of the corporators of the "Remington-Sholes Typewriter Company," is the son of Samuel Remington, deceased, who was an officer and a stockholder of E. Remington & Sons until his decease in 1882. In his youth Carver lived in Ilion, where his father then resided. About 1864 or 1865, the family removed to Utica, N. Y., where they resided until about 1868, when he went to Europe where he remained continuously until early in 1875. In 1875, Carver returned to this country and soon after his return he entered the service of the Hannibal & St. Joe Railroad Company, where he remained about a year and then returned to Ilion. He did

not engage in any kind of business there, although his uncle at his father's request, endeavored to interest him in the office of the works of E. Remington & Sons. In 1877, when his father returned from Europe, Carver had no business. *After his father's return, in 1877, Carver was induced to pay some attention although quite spasmodic, to business, which consisted in keeping some of the account books in the office* and he had one share of stock in E. Remington & Sons corporation, given to him by his father to qualify him as one of the directors of the corporation, and he was appointed secretary. This was done with a view to interesting him in the business. *His duties were, however more nominal than real*, as there were no regular meetings of the Board of Trustees, and the records that were kept were very few and very slight, and there is no evidence that Carver even kept those. *He took no part in the mechanical department of the works at all, and in fact his connection with the works was of a very slight character.* He did not evince any disposition to tie down to business.

He had no knowledge of or skill in the typewriter business. After his father's death and in the early part of 1883 he engaged in sundry kinds of business and at various places and was residing at Chicago and engaged in a contracting business with his brother, Franklin Remington, when he became interested in "The Z. G. Sholes" typewriter.

R., pp. 58, 59, 60, 100, 101, 401, 402.

FRANKLIN REMINGTON.

Franklin Remington was born about the time the corporation E. Remington & Sons was created. He lived abroad with his parents from about 1868 until 1878, when he returned to this country. After completing his education in 1887, he went to Cazanovia, New York, and spent some time on a farm, which his father owned at the time of his death,

and from there he went to Chicago and engaged in *contracting* business. *He never had anything whatever to do with the typewriter business carried on by E. Remington & Sons, from 1873 to 1886, nor was he ever engaged in that kind of business until he became associated with the "Remington-Sholes Typewriter Company,"* and later with the "Remington-Sholes Company," neither of which selected the name "Remington" as a part of its corporate name, because the reputation of its stockholder Franklin Remington was such that the use of his name would increase the chance of business success on its own merits, but because the name, "Remington," had been long used by appellee and its predecessors in the typewriter business, and would give a title so similar to the trade-name of appellee's machine and business that purchasers might be induced to buy the machines of appellants in the belief that they were the product of appellee's manufactory, or had some connection with it and its predecessor's business.

R., 57, 61, 100, 412.

SAMUEL REMINGTON.

The proofs in this case show that E. Remington & Sons began the manufacture of certain models of typewriters in the year 1873, and the manufacture of commercial typewriters which were put upon the market early in 1874. Samuel Remington did not participate in the making of the original contract, but at that time was abroad. He did not return until November, 1877.

R., pp. 38, 43.

After Mr. Remington's return from Europe in 1878, he resided in New York City. The greater portion of his time after his return was spent in the New York office and warehouse of E. Remington

& Sons, of which he took principal charge and management, making only occasional visits to Ilion. *His attitude towards the typewriter business and the manufacture and sale of writing machines was very unfriendly. He opposed it and remarked several times that E. Remington & Sons ought never to have taken hold of it, that their legitimate business was the manufacture of arms, and that they had never made any money outside of that branch of their business.* He had frequent conversations with one James Densmore on the subject of getting rid of the typewriter and threatened to "kick it out."

R., pp. 55, 56, 57.

Samuel Remington never had anything to do in a practical way with the manufacture of the typewriting machines. He never suggested any improvement in the machines or in the manufacture thereof. He was very little at Ilion, after his return from Europe in 1877, and when there was almost exclusively engaged in matters of finance and in correspondence with parties abroad, *with reference to the procuring of orders for the manufacture of military arms, which was his particular branch of the business.*

R., p. 57.

The business at the works was looked after by the oldest brother, Philo Remington, who was always recognized as the head of the manufacturing department, not only with reference to typewriters, but in respect of all the products of E. Remington & Sons.

R., p. 57.

In the light of the evidence in this case, the suggestion of appellants' counsel that Sholes and the Remingtons took the name "Remington" for the machine, etc., on account of "pride of ancestry" and in order "that history might repeat itself" appears wholly inadmissible and even absurd.

Samuel Remington died in December, 1882, and in September, 1883, the administrators of his estate transferred to the eldest brother, Philo Remington, all of Samuel's interest in the corporation E. Remington & Sons, consisting mainly of shares of capital stock which he had owned in that corporation.

R., p. 60.

At the time of Samuel Remington's decease his son Franklin was about 18 years of age. It is, therefore, plain that the knowledge of Samuel Remington of the typewriter business and his interest therein were not such as to inspire his sons Carver and Franklin with any love for that business or cause them to engage therein, as alleged by the defendant-appellants in their answer in this case.

R., p. 21.

CHARLES NORMAN FAY.

Mr. Fay was one of the "strong capitalists" who formed the Remington-Sholes Typewriter Company to manufacture the "Remington-Sholes" machines, and put them on the market, and is the person under whose personal supervision the No. 2 model "Remington-Sholes" or "Rem-Sho" was brought out, as set forth in the catalogue of the "Remington-Sholes Company." *Fay was the chief promoter of the Remington-Sholes Typewriter Company, and received one-third of the capital stock of that company as compensation for his services in organizing it.* According to Mr. Sholes' testimony, Mr. Fay had charge of the organization of the Remington Sholes Typewriter Company, was one of the first directors of the company, and became the president thereof. His holdings of stock during the existence of the Remington-Sholes Typewriter Company were large, as appears by "Complainant's Exhibit Certificate of Dissolution of the Remington-

Sholes Typewriter Company" (R., p. 838). In December, 1896, he held 1,171 shares of the capital stock in his own right and 392 shares as trustee, the whole capitalization then being 2,500 shares. Fay and the other corporators knew the great value of the name "Remington" at the time they chose it as a part of the corporate name. That name was then of world-wide repute, and offered something more than a "talking point for their machine." This is shown by the evidence of Browne, who testified that Fay spoke of it as an inducement to him when he was considering the advisability of becoming an agent for the sale of the so-called "Remington-Sholes" typewriter. *That was in August, 1894, before the company had manufactured or sold any machines, and after they had been notified of complainant's rights and claims in the premises.* During the earlier history of the "Remington-Sholes Typewriter Company," while Fay was its president, the largest stockholder and controlling factor in the company, he allowed Sholes, Franklin Remington and others to look after the details of the business. It appears that he was absent in Europe for a portion of the year 1895, and that on his return he found the business so unsatisfactory that he was prompted to remark to Sholes that "he had paid too much for the machine, and *the only value he attached to it was the name.*" Undoubtedly Fay's remark had reference mainly, if not wholly, to the name "Remington," as he knew that name was of great value in the typewriter trade, by reason of its long use in connection with complainant's business and the repute of the "Remington" typewriter throughout the civilized world.

R., pp. 291, 292, 408, 409, 419, 447, 813, 807, 839.

WHAT PROMOTERS KNEW AT THE TIME OF THE ORGANIZATION OF THE REMINGTON-SHOLES TYPEWRITER COMPANY AND THE REMINGTON-SHOLES COMPANY.

At the time of the organization of the Remington-Sholes Typewriter Company *the corporators—Fay, the Remingtons and Sholes—were all acting together in furtherance of the same unlawful purpose, and the reorganization of said company was only a reproduction and continuation of the old fraudulent scheme. In other words, the Remington-Sholes Company stands in no better position than did its predecessor, the Remington-Sholes Typewriter Company*, under whose pretended title to the name Remington it justifies in this case. The Remingtons and Fay and Sholes all knew the history of complainant-appellee's business; knew that the product of its factory was known as the "Remington" typewriter; knew that large sums had been expended in advertising its machines and business; knew that an immense trade had been built up by appellee and its predecessors, and that a large demand existed for its machines; knew that the name "Remington" was valuable in the typewriter trade on account of the reputation given to it by complainant-appellee and its predecessors, and not on account of the reputation of Franklin Remington or Carver Remington, neither of whom was ever engaged in, or had any knowledge of, or skill in, the typewriter business. The choice of the name was admitted to have been an "intelligent" one; "those who selected it well knew that the use of the name Remington in connection with a typewriting machine would help to sell it, as the name of Brown or Peterson would not. They knew, too, that it would be thus helpful, because it suggested to the purchaser that it had been made by the Remington concern, whose name was a 'by-word for good workmanship the world over.' They knew that

the presence of that name on the machine would be a constant temptation, often yielded to by whomever sold one to the uninstructed purchaser, to represent that it was the 'real,' or the 'improved,' Remington; that the presence of the name made confusion easy; and that the results of any confusion would be entirely in their favor. It was because of that knowledge that the Remingtons' associates—Sholes, the sole inventor of the machine, and Fay, the capitalist, whose contributions enabled the new concern to manufacture on a scale large enough to bring it into the field as a competitor—selected the Remingtons' name, not because they were willing to pay some graceful compliment to Franklin Remington for the energy and enthusiasm with which he entered upon his new sphere of activity, or to himself and his brother for the $15,000 they invested in the enterprise."

Neither of the Remingtons nor Fay presented themselves as witnesses in this cause for the purpose of explaining their connection with the organization of the Remington-Sholes Typewriter Company or the Remington-Sholes Company; but the evidence of Sholes, taken in connection with other facts and circumstances disclosed in the record, fully justifies the inference that all of the corporators had full knowledge of the facts in the premises prior to and at the time of the organization of the Remington-Sholes Typewriter Co.

R., pp. 805, 806.

Having full knowledge, it is no defense that the name "Remington" or "Remington Company" or "Remington Typewriter Company" was assumed in good faith and without design to mislead the public and acquire appellee's trade.

Higgins Co. *v.* Higgins Soap Co., 144 N. Y., 462, 471; Roy Watch-Case Co. *v.* Camm-Roy Watch-Case Co., 58 N. Y., Suppt., 979, 981; Fuller *v.* Huff, 104 Fed. Rep., 141, 145; Johnston *v.* Orr-Ewing, 7 App. Cas., 219 (1882).

Z. G. Sholes, one of the active promoters of the "Remington-Sholes Typewriter Company," testified that after he became associated with the Remingtons, he became satisfied that it would be an advantage, in the sale of **"The Z. G. Sholes"** typewriter, to have it sold under the name "Remington-Sholes." *He though the name "Remington" was a valuable addition to his name because that name had been used in connection with appellee's business and machines.*

R., p. 426.

He further testified that if the names of the Messrs. Remington had been Smith or Peterson he would not have changed the name of his model machine.

R., pp. 424, 425.

Mr. Fay, one of the "strong capitalists, who as chief promoter received $50,000 worth of the stock of the Remington-Sholes Typewriter Company for his services in organizing that company and securing working capital therefor, shortly after the organization of said company urged one Browne to take the agency for the sale of the "Remington-Sholes" typewriter because the name Remington would be of material assistance in selling the new machine.

R., p. 447.

At that time nothing had been done by the Remington-Sholes Company or its promoters to make the name "Remington," or even the name "Remington-Sholes," of value, as it had not then manufactured, or sold, or advertised for sale any typewriting machines. The name "Remington" had been made valuable in the typewriter business on account of the reputation given to it by the appellee and its predecessors. It is therefore plain that the "Remington Sholes Typewriter Company" was formed so that the name "Remington" could be used on its machines and given the advantage which that name had in the market.

Manifestly a *new* machine placed upon the market under a *new* name would not attract or readily secure the attention and patronage of the public, but *christened* as "Remington-Sholes" it would be readily accepted as the product of appellee, "the Remington concern."

Directly after the Remington-Sholes Typewriter Company was organized its officers and directors were requested in writing to desist from the use of the name "Remington" as a part of the corporate name of the Remington-Sholes Typewriter Company and in connection with the manufacture and sale of its writing machines. Subsequently a similar written notice was served upon the Remington-Sholes Company and the Howe Scale Company of 1886.

R., pp. 291, 292, 805–809.

The letter of Franklin Remington, of date Jan. 22, 1896 (R., p. 1444), acknowledging the receipt of complainant's communication of June 16, 1895 (1894), and other letters show that notwithstanding Franklin Remington, Sholes and their associates had full knowledge of all the facts, they nevertheless persisted in the use of the name "Remington," thereby ignoring complainant's objection and protest. This proves the value which they attached to said name, and indicates their deliberate intention to use it without reference to appellee's prior rights.

REASONS FOR SELECTING THE NAME REMINGTON.

There is no doubt that the promoters and incorporators of the Remington-Sholes Typewriter Company and the Remington-Sholes Company intended to obtain some of the value of the name "Remington" and "Remington Company," etc., and that the name was adopted and used to enable said corporations to avail of the established reputation of the appellee's business and machines, which were well known in the trade and by purchasers and users under those names. *The names of Franklin Remington and Carver Remington were not of the slightest value in the typewriting business, in which they had never been engaged. They were unknown to the trade and had never acquired any reputation in the market in connection with the manufacture or sale of typewriters. The name was not adopted to obtain the benefit which would accrue to the corporation from the services or the reputation of these Remingtons, but solely to gain the benefit of the great reputation which belonged to the business of appellee and its writing machines.* The name was chosen in order to have it believed that "Remington-Sholes Typewriter Company" and "Remington-Sholes Company" were "*Remington*" corporations, and were marketing and dealing in "*Remington*" machines, or a species thereof, or *a new and an improved Remington typewriter.* Manifestly the name Remington was adopted because likely to facilitate the sale of the machines manufactured and sold by said companies. No doubt the phenomenal growth and extent of complainant-appellee's business suggested to the promoters of the Illinois corporation, the feasibility of deriving a substantial benefit from the reputation of appellee's business, generally known as that of the "Remington Typewriter Company," and "Remington Company," and the appellee's machine known as the "Remington" and "Remington typewriter."

The use of the name is sought to be justified because of the fact that one or more of the corporators' names happened to be Remington; but we shall presently show that that fact furnished no justification for the adoption and use of this name. Had it been the wish of the incorporators of the Remington-Sholes Typewriter Company, or the Remington-Sholes Company, to establish a *distinctive* reputation for their machines with the public, *and to so mark and designate them that they would always be unmistakably recognized by intending purchasers*, they would not have begun by assimilating the names of their companies, or their machines, with those of the complainant-appellee—a competing manufacturer and vendor of writing machines. The fact that they did this warrants the inference that for some reason or other they preferred to have their company styled and their machines marked and designated, *not with a distinctive name, such, for example, as "Fay-Sholes"—since adopted—but by one resembling a competitor; and when it is seen that such competitor is the manufacturer of the most famous and extensively used writing machine in the world, and in 1899 had expended more than $1,000 000 in advertising its machines, the reason therefor is perfectly obvious.*

Men act from motives, and no motive for adopting the name "Remington," "Remington-Sholes Typewriter Company," or "Remington-Sholes Company," is shown except the motive of gain from the use of a name of world-wide repute, long the distinctive appellation of appellee's and its predecessor's machines and business. It was an UNNECESSARY USE, by the Illinois corporations, of a name theretofore exclusively used by appellee and its predecessors, in connection with writing machines, and if nothing was wanted of the reputation which had been acquired under the name "Remington," and which that name stood for, it could have been left and another selected, or the business could

have been carried on and the machines put upon the market under the designations first selected, to wit: "THE Z. G. SHOLES COMPANY," and "THE Z. G. SHOLES" TYPEWRITER, or "**Fay-Sholes Company,**" and "**Fay-Sholes Typewriter,**" since adopted. The corporators undoubtedly took the name Remington-Sholes Typewriter Company and Remington-Sholes Company, for their corporations, *in order that they might plausibly assert and induce the belief that their product was a Remington writing machine, or a species thereof, or a "new" and an "improved" Remington typewriter*, and that their machines were the "real" "Remington" typewriters, and that they were the *successors* of or a branch of the old Remington concern.

To impress upon the public the belief that the business of this Illinois corporation was a continuation of the character and business of the old Remington concern and its machines "real" Remington typewriters they stated in their advertisements, and their agents and dealers proclaimed by word of mouth, that their writing machine was "the only typewriter manufactured to-day by a Remington," and that "it represents the second generation of typewriter manufacturers bearing this great name."

R., pp. 226, 227, 973, 1038, 1055, 1197, 1198, 1348, 881, 972.

In the Remington-Sholes Company's catalogues advertising its No. 2 and 3 machines, *on the back side of the title page*, were conspicuously printed these words: "**The only machine now made by a Remington.**" These catalogues are shown to have been circulated by the company and its agents. This clearly shows it was the intent and purpose of the "Remington-Sholes Company," and its officers and agents, to trade upon the name "Remington," and that they regard that name as very valuable in the typewriter trade on account of the reputation given to it by complainant-appellee and its pre-

decessors. Obviously their only motive in adopting that name was to decoy the public, and to surreptitiously obtain the advantage of the good reputation which appellee and its predecessors had given to machines bearing the name "Remington."

GROUNDS OF DEFENSE RELIED UPON BY DEFENDANTS-APPELLANTS.

The defense in this case is based, mainly, upon the broad proposition that inasmuch as one of the incorporators and stockholders of the Remington-Sholes Typewriter Company, and Remington-Sholes Company, bore the surname Remington, and might have engaged in the typewriter business under his own name, and had consented to the use of his name, ergo, no right of the complainant-appellee was invaded by giving to said corporations, formed by him and others, the name of Remington-Sholes Typewriter Company, and Remington-Sholes Company, and designating their product as the "Remington-Sholes" typewriter and "Rem-Sho" typewriter.

The defendants-appellants set forth this view in their catalogues, wherein it is said: "we are sometimes asked about the right of the Messrs. Remington and Sholes to the use of their own names in connection with typewriters. In answer we would say that the law is absolutely clear that every man has a right to use or permit the use of his own name (which is his birth-right) in business, provided it is so used as not to deceive."

In support of this contention defendant's answer alleges "that said Franklin Remington and said Carver Remington were sons of Samuel Remington, who was one of the officers of the corporation E. Remington & Sons referred to in the bill of com-

plaint, and that said Zalmon G. Sholes was the son of one C. Latham Sholes, who for many years prior to his death (in or about the year 1891) was engaged as an inventor of typewriting machines; *that said Franklin Remington, said Carver Remington and said Zalmon G. Sholes did during the lifetime of their respective fathers acquire a special interest in and knowledge of the manufacture of typewriting machines, and naturally, therefore, devoted themselves to the business in which their respective fathers had become conspicuously proficient.* That prior to his joining with said Franklin Remington and said Carver Remington, said Zalmon G. Sholes had invented a certain new and useful typewriting machine, and, desiring to place the same upon the market, enlisted the interest of said Franklin Remington and said Carver Remington, who thereupon proceeded to devote much time and money to the development and exploiting of said invention and for the purpose of interesting capital therein. That inasmuch as the said new typewriting machine had been invented by said Zalmon G. Sholes and had been built with the aid of and under the personal direction of said Franklin Remington and said Carver Remington, the name Remington-Sholes was thereupon naturally given to said machine, the production of which had been due to the joint efforts of said Remingtons and said Sholes."

R., pp. 20, 21.

Another paragraph of defendant-appellent's answer alleges as follows: "And respondent therefore avers that when said Franklin Remington, said Carver Remington and said Zalmon G. Sholes undertook the manufacture of typewriting machines devised and constructed by them, they had a full and lawful right to designate the said machine as the 'Remington-Sholes' machine, and that when they caused a corporation to be organized for the purpose of manufacturing their machine, they had a full and lawful right to designate and name said

corporation as the 'Remington-Sholes Typewriter Company,' and to give to said corporation as they did the exclusive right to use said name in connection with the manufacture and sale of said machine." * * *

R., p. 22.

In their brief and in argument, in the court below, counsel for appellants assigned, substantially, the following reasons why the name Remington-Sholes Company, etc., was used:

I. It was reasonable that Remington and Sholes should form a corporation for the manufacture of their typewriter, because alone they had not the necessary capital to manufacture it, and because all other typewriters are made by a corporation.

II. That it was reasonable that they should adopt the name Remington-Sholes for their machine, because both had labored incessantly for many months in the production of it, Sholes contributing the inventive genius, and Remington giving his time and furnishing the funds for the reconstruction and exploiting of the model machine.

III. That it was reasonable that the corporation created to make the machine should bear the names of both; (*a*) because the machine was distinctly the product of both and owed its existence to both; (*b*) because it was the almost universal custom in the typewriter trade to identify the corporation and machine by the same name; (*c*) because Sholes' father invented, and Remington's father was president of appellee's predecessor, E. Remington & Sons, which gave the world the pioneer typewriter, *i. e.*, the "Remington;" (*d*) because the public would be interested in the coming together of these two sons; (*e*) because the name Remington had a world-wide reputation in many lines of trade older than and distinct from the good will of the typewriter business; (*f*) be-

cause the public is attracted by family reputation in trade, etc.; (*g*) because the court and the public recognize the value of a father's good name, and his son's right to avail of it; (*h*) because having the right to use their names like ordinary property they had the right to bestow such names upon a corporation of their own creation in which they held a large part of the stock and to which their time and energy was devoted.

IV. That it was reasonable that the reorganized Remington-Sholes Company should continue to bear the name of the old Company, inasmuch as it was the successor to the old Company, and had advertised the machine under the name Remington-Sholes Typewriter Company, and Remington-Sholes, etc.

First. The reasons assigned in defendant-appellant's answer for the adoption and use of the name "Remington" as the salient feature of the corporate name "Remington-Sholes Typewriter Company," and Remington-Sholes Company," and as a part of the designation of their product, are wholly inadmissible and are, in the main, unsupported by any evidence in the record. Franklin Remington and Carver Remington were the sons of Samuel Remington, who was at one time an officer and a stockholder of E. Remington & Sons corporation, but Samuel never took any personal interest whatever in the manufacture of the so-called "Remington" typewriter, as hitherto shown. *He always assumed a hostile attitude towards the typewriter.* The allegation in defendant-appellant's answer that Franklin Remington and Carver Remington, *during the life-time of their father, acquired a special interest in and knowledge of the manufacture of typewriting machines, and naturally devoted themselves to the business in which their father had become conspicuously proficient*, is, when read in the light of the evidence of complainant-appellee's witnesses, Richardson and Jenne,

absurd, and without a scintilla of evidence in defendant-appellant's testimony to support it.

As already shown, neither Carver Remington nor Franklin Remington ever had anything to do with the typewriter business of E. Remington & Sons, or had any knowledge of, or skill in the manufacture or sale of typewriters of any kind or make, before they bestowed their name on the so-called "Remington-Sholes Typewriter Company" and its product.

There was nothing in the connection or association of the Remingtons with this model machine which furnished any good or sufficient reason why the name thereof should have been changed from **"The Z. G. Sholes"** to "Remington-Sholes." It was the product of Sholes, he having invented and built it before the Remingtons acquired their interest therein, and *naturally* Sholes and the persons theretofore interested in the model named it **"The Z. G. Sholes,"** and called the company, organized to manufacture machines like said model, **"The Z. G. Sholes Company."** These names might have been continued by the Illinois corporations.

It was the expected profits from the use of the name "Remington," which induced Sholes and the Remingtons to change the name of the machine and to organize a corporation under the name and style of "Remington-Sholes Typewriter Company" for the manufacture thereof. If the names of the Remingtons had been *Smith or Peterson* the designation of the machine would not have been changed, and either Sholes' name or some other appellation would have been selected for the new corporations.

As said by Justice Bradley (Celluloid Case, 32 Fed. R., 97), **"it will take a great deal of explanation to convince any man of ordinary business experience that this change of name was not adopted for the purpose of imitating that of the old successful company."**

Second. The first of the reasons, above assigned, namely, that it was *reasonable* that Remington and

Sholes should form a corporation for the manufacture of typewriting machines like or similar to the model, is not sufficiently relevant to the issues in this case to require any extended comment. It is probably true that Messrs. Fay and Head, who furnished the working capital for the enterprise, preferred that the business should be carried on under corporate management, but "no necessity, business or otherwise, required the selection of the name Remington-Sholes for the corporation" which was then created. The public had no knowledge of this name—"Remington-Sholes"—in connection with a typewriter, and the Remingtons were unknown to the public and had no knowledge of or skill in the typewriter business. In the circumstances of this case the use of their names was both unnecessary and improper.

Third. It is asserted that it was *reasonable* to adopt the name Remington-Sholes for the machine, because *both* had labored for many months *in the production of the machine*, Remington furnishing the funds to effect *its reconstruction* and the exploiting thereof. "The Z. G. Sholes" model was *developed and completed before the Remingtons purchased an interest therein*, and it bore the name of the inventor, Sholes.

R., pp. 390–392.

After "The Z. G. Sholes Company" was formed, which was in April, 1893, *machinery was purchased with which to manufacture tools to build the machine.*

R., pp. 400, 401.

It is, therefore, plain that "The Z. G. Sholes" model was then deemed *sufficiently developed and perfected* to serve as a model from which tools could be made for building *commercial* machines like it.

Moreover, the *Remingtons* did not acquire any interest in the model until on or *about Aug. 26th, 1893* (R., pp., 402–405, 826), and prior to that time

the model machine *had been produced and owed its existence to Z. G. Sholes and the persons who had theretofore been associated with him.*

After the Remingtons acquired their interests the model machine was for several months exploited with a view to selling and disposing of the same.

R., pp. 404-407, 415, 416.

Subsequently—about Nov., 1893—the *name* of the model was changed and the Remington-Sholes Typewriter Company thereafter organized as heretofore stated.

R., p. 417.

Prior to the organization of the "Remington-Sholes Typewriter Company" some changes were made in the model, but it does not appear that they were of a material character (R., p. 413), and even after the "Remington-Sholes Typewriter Company" was formed and the machine was being prepared for the market the changes from the original model were only in matters of detail.

R., p. 411, 434.

Manifestly there was no "*reconstruction*" of the model machine as alleged by appellants, and aside from the purchase of an interest in the model, etc., the funds furnished by Franklin Remington were mainly expended in exploiting and promoting the machine.

The alleged conferences between Sholes and Remington in regard to changes made in the machine occurred while it was being prepared for the market (R., p. 434). At that time both Remington and Sholes were employees of the so-called "Remington-Sholes Typewriter Company."

Fourth. It is asserted that it was *reasonable* that a corporation created to make the machine should bear the name of both Remington and Sholes, because *the machine it was to manufacture was distinctly*

the product and owed its existence to both. We have already shown that *only one machine* existed at the time the Remington Typewriter Company was formed, and that was the model first known as "The Z. G. Sholes," the name of which was changed to "Remington-Sholes," *and that this model was the product of and owed its existence to Sholes and others and not to either of the Remingtons.*

It is also asserted that it is the almost universal custom in the typewriter trade to identify by the same name a corporation and the machine that is to be manufactured. There is no universal custom in the premises. In some cases this is the fact, while in others the names are different. No peculiar custom in this respect prevails in the typewriter trade.

It is further asserted that Sholes' father having invented the pioneer typewriter, which E. Remington & Sons, whereof Franklin Remington's father was at one time President, gave to the world, the public would be interested in the coming together of these sons. Sholes' father was *only one of several inventors of the pioneer typewriter manufactured by E. Remington & Sons*, and which was known as the "Sholes & Glidden" typewriter.

Remington's father never had any interest in any typewriter business separate and apart from that which was carried on by E. Remington & Sons, and in which, as we have seen, he took little or no *personal* interest. Neither of these two Remingtons had any knowledge of the typewriter business, they were unknown to the public, and it is not seen wherein "the public would be interested in the coming together of these sons." The whole typewriter business of E. Remington & Sons and the good will thereof were transferred to appellee's predecessor in 1886, and the same became and now is wholly vested in appellee, and "when the Remington-Sholes Company and its predecessor entered the field, complainant had a world-wide reputation." That reputation had been acquired as the successor to E. Remington & Sons and in the manufacture and sale of the "Remington" typewriter.

It is further asserted that the family name of Remington had a world-wide reputation in many lines of trade, older than and distinct from the good will of the typewriter business. This is undoubtedly true as regards fire arms. But the fact that the name Remington had or has a good or a wide reputation in connection with fire arms and other devices, hitherto manufactured and sold by E. Remington & Sons, furnishes no ground for the use of the name in connection with the manufacture and sale of typewriters. Suffice it to say that the good will and repute of E. Remington & Sons, as respects the typewriter business, were and are the property of appellee.

It is, also, said that the public is attracted by family reputation in trade and that the courts and the public recognize the value of a father's good name and a son's right to avail of it. Conceding for argument's sake that this be so, nevertheless the son's may not appropriate the good will, trade names or trade marks of the old concern with which the father was associated to the damage or injury of the lawful successor.

Finally it is alleged that having a right to use their names like other property, these Remingtons had a right to bestow such names upon a corparation of their own creation in which they held a large part of the stock, and to which all their time and energy was devoted. It is to be noted that the Remington-Sholes Typewriter Company was organized by the two Remingtons and Sholes in conjunction with Head and Fay, the latter of whom was the principal promoter. The corporation was at first organized with a capital of $150,000. Directly after its organization Sholes and the Remingtons transferred one third of their stock—five hundred shares—to Fay and in order to raise funds for working capital $100,000 more was added, making the total capitalization of the company $250,000. This additional stock was taken by Fay and others. After the organization of the company and the in-

crease in the capitalization, as above mentioned, the two Remingtons appear to have held about three-tenths of the stock, but their interests gradually diminished and, on the dissolution of the Remington-Sholes Typewriter Company in November, 1896, Franklin Remington appears to have owned about one-tenth of the stock, while Carver Remington then had comparatively little interest in the corporation. In the new corporation, "Remington-Sholes Company," organized in 1897, Franklin Remington held only one-twentieth part of the stock of the corporation, that is 150 of the three thousand shares, but neither Sholes nor Carver Remington had any interest therein.

The alleged right of the Remingtons to bestow their names upon the corporation Remington-Sholes Typewriter Company, we will presently consider. In respect of the right of the Remington-Sholes Company to continue to bear the name of the old company, and to advertise its machines under the old names, it is to be said that it stands in no better position than its predecessor and that it is in effect but a reorganization of the original concern.

But these alleged reasons for taking the name Remington and using it with the name Sholes are clearly displaced and rebutted by the testimony of Sholes and others, which shows that the name Remington was taken "because that name had been used with another typewriter business (appellee's) and another typewriting machine—namely, the 'Remington' typewriter."

R., p. 426.

The court below, among other things, said: "We have no doubt whatever that the name Remington was chosen because it was expected that it would naturally lead the public to suppose that the new corporation was either the successor or some branch of the old concern, of which appellees' brief observes: the 'name Remington was admittedly a by-word for good workmanship the world over'"

Again the court said: "They knew that the presence of that name on the machine would be a constant temptation, often yielded to by whomsoever sold one to the uninstructed purchaser, to represent that it was the 'real' or 'improved' Remington; that the presence of that name made confusion easy; and that the results of any confusion would be entirely in their favor."

Third. The case at bar is not one in which the manufacturer is using his own personal name in his own business. While the right of an individual to employ his own name in connection with his own business, or with an article of his own production cannot be denied, yet he may not designate his article by his own name in such a way as to cause it to be mistaken for the manufacture or goods of another already on the market under a similar name. Whether it be his name or some other possession, he must so use his own as not to injure the possession or right of another. While an individual has a natural and inherited right to use his own name in his own business, nevertheless the courts have not hesitated in many cases to direct the manner in which a person shall use his own name.

Moreover, this is not a case in which the Remington-Sholes Company and its predecessor were using the name of another person which had become generic. Nor is it one in which the name or names are descriptive of well known classes of goods, as, for example, "Goodyear rubber," which in the case of India Rubber Glove Manufacturing Company *v.* the Goodyear Rubber Company (128 U. S., 598–604), was held to be a term descriptive of well known classes of goods produced by a well known process. In this latter case the words "Goodyear rubber" had lost their *distinctive* character, fallen into common use and become *publici juris*.

Furthermore, the case at bar is not one where the Illinois corporations must, to a certain extent, use the name of the complainant-appellee, and it is not,

therefore, one of *damnum absque injuria*. It is the case of an *unnecessary use* of a name long previously employed by another in the same business, and in which the use thereof by the "second comer" constitutes an untrue and deceptive representation (Fuller *v.* Huff, 104 Fed. Rep., 141, 144, 145; R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. Rep., 1017; Clark Thread Co. *v.* Armitage, 74 Fed. Rep., 936, 944; Meyer *v.* Bull Medicine Co., 58 Fed. Rep., 884; Investor Pub. Co. *v.* Dobinson, 72 Fed. Rep., 603).

Fourth. In this case the defendant-appellants stand in the same posture as if no person who was born into the name of Remington had ever been connected with the "Remington-Sholes Typewriter Company," or the "Remington-Sholes Company," either as an officer or employee, or as a corporator or stockholder.

In all cases, except where reason and public policy forbid, a corporation is regarded as a legal entity, separate and apart from the natural persons composing it (A. and E. Enc. Law (2nd Ed.), Vol. 7, p. 633; Thomas *v.* Dakin, 22 Wend. (N. Y.), 69-72; People *v.* Watertown, 1 Hill (N. Y.), 616; Niagara Co. *v.* People, 7 Hill (N. Y.), 504; Fietsam *v.* Hay, 122 (Ill.), 293; Dartmouth College *v.* Woodward, 4 Wheat (U. S.), 518-636; Cook on Corporations, Vol. 1, Sec. 1, p. 2, and Sec. 6, pp. 20, 21).

In People *v.* Watertown, *supra*, Judge Bronson said: "The individuals composing these associations (banking) are united in one body and the members lost in the corporate existence. It is not the individual members, but the legal being which acts and transacts business."

A corporation is an artificial person and its name is "an artificial thing," which can be selected by its incorporators from the entire vocabulary of names. A person comes naturally by his name, and may use it honestly in his own business, but he may not

resort to any artifice or do any act calculated to mislead the public and thus produce injury to another beyond that which results from the similarity of name. But a corporation is not endowed with the inalienable rights of a natural person, and does not inherit its name, which is an artificial and impersonal thing chosen by the promoters and organizers thereof.

In respect of corporations which have adopted and are using the name of an older concern engaged in the same business, the rule in such a case is concisely stated in the case of the Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. Rep., 357, 367, 368, as follows: "Where the second comer is a corporation that has adopted such name as part of its corporate name, the case has been treated as one where a person not of that name has adopted it as his business name, and marked his goods with it, even though some or all of its incorporators, stockholders or officers may be of that name. For, in such case, it is the corporation and not the individuals connected with it that is doing the business in that name, and marking its goods with it, and, before the adoption of the name by it, it had no such name. Cases of this sort are the cases of William Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co. (C. C.), 11 Fed., 495; Le Page Co. *v.* Russia Cement Co., 2 C. C. A., 555; 51 Fed., 941; 17 L. R. A., 354; Meyer *v.* Dr. B. L. Bull Vegetable Medicine Co., 7 C. C. A., 558; 58 Fed., 884; William Rogers Mfg. Co. *v.* R. W. Rogers Co. (C. C.), 66 Fed., 56; Clark Thread Co. *v.* Armitage (C C.), 67 Fed., 896; R.W. Rogers Co. *v.* William Rogers Mfg. Co., 17 C. C. A., 576; 70 Fed., 1017; Investor Publishing Co. *v.* Dobinson (C. C.), 72 Fed., 603; Clark Thread Co. *v.* Armitage, 21 C. C. A., 178; 74 Fed., 936; Fuller *v.* Huff, 43 C. C. A., 453; 104 Fed., 141; 51 L. R. A., 332; Wyckoff *v.* Howe Scale Co. (C. C.), 110 Fed., 520; Lamb Knit Goods Co. *v.* Lamb Glove & Mitten Co., 120 Mich., 159; 78 N. W., 1072; 44 L. R. A., 841; Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y., 462; 39

N. E., 490; 27 L. R. A., 42; 43 Am. St. Rep., 769; De Long *v.* De Long Hook & Eye Co. (Sup.), 32 N. Y. Supp., 203; Penberthy Injector Co. *v.* Lee, 120 Mich., 174; 78 N. W., 1074; Holmes *v.* Holmes, Booth & Atwood M. Co., 37 Conn., 278; 9 Am. Rep., 324; Meriden B. Co. *v.* Parker, 39 Conn., 450; 12 Am. Rep., 401; Williams *v.* Brook, 50 Conn., 278; 47 Am. Rep., 642.

In the case of Higgins Co. *v.* Higgins Soap Co. (144 N. Y., 462), the New York Court of Appeals, speaking through Chief Judge Andrews, said: "The main ground upon which the plaintiff has been defeated in the courts below is that Charles S. Higgins, or the members of his family, either separately or jointly, had the right to establish the soap business and to use the name of Higgins in conducting it, and to designate the product as 'Higgins Soap,' and that no right of the plaintiff was invaded by giving to the corporation formed by them the name of 'Higgins Soap Company.'" * * * "But the question as to the right of the defendant to assume the name of the 'Higgins Soap Company' or to do business in that name, is not affected by any contract entered into between Charles S. Higgins and the plaintiff. *The defendant is a distinct person in the law from Charles S. Higgins, one of its corporators and officers.* It had entered into no contract with the plaintiff, nor does it derive any of its rights from Charles S. Higgins. *It stands in respect to the question involved in this litigation in the same situation as if Charles S. Higgins had never been a corporator or stockholder.* It cannot appropriate the name, or the trade-marks, or the business of the plaintiff by any simulation or deceit, because the law prohibits such appropriation by any person, natural or artificial." * * * "On the other hand, *we think it equally clear that the defendant derives no additional immunity from the fact that the name of 'Higgins,' in its corporate name, was that of one or more of its corporators, or that Charles S. Higgins,*

or any one of that name, might engage in the soap business under the family name, or that Charles S. Higgins and the other corporators of the same name had consented to its use.

The case of DeLong *v.* DeLong in the New York Supreme Court (32 N. Y. Supp., 203) is to the same effect.

In that case Judge O'Brien said: "The right, however, of one to use his own name in his own business is something very different and distinct from the lending or giving of his name to a corporation for the purpose of engaging in a business which has been conducted by others under precisely the same name. A person comes naturally by his name from his parents, and it is a thing personal to himself, which in truth and justice he has the right to use, provided its use is not coupled with any acts or artifices calculated to produce deception or confusion in the public mind between him and some other person to the injury of the latter and the public."

"*The name given to a corporation is an artificial and impersonal thing, which can be selected from an entire vocabulary of names; and the difference between using a name so selected, identical with that under which others do business, and the case of the use by one of his own name in his own business seems to me clear and manifest.* To say that one has the right to select his own name as a designation of a corporation is but another way of stating that he has a right to select any title from among the whole range of names; but it is not equivalent to a statement that he can give his own name to a corporation with a view to making it similar to that employed by other persons in the same business, to their or the public's injury."

The DeLong case was appealed to the General Term of the New York Supreme Court, where the judgment of the court below was affirmed. The learned General Term, following the Higgins case,

held "that a corporation cannot acquire the name of one of its incorporators and use it to deceive the public and to defraud others, who have built up a business under the same name, on the ground that such is the true name of the incorporator."

In the case of Wm. Rogers Mfg. Co. *v.* R. W. Rogers Co. (66 Fed. Rep., 56) the Court said: "Although the use of a personal name as a trademark will not be protected against its use in good faith by a defendant who has the same name, the reason of the rule ceases, and the rule no longer applies, where the defendant, as in the case of a corporation selects its own name; especially where it appears that such name is selected with an intention to mislead."

The Circuit Court of the United States for the Southern District of New York approved the doctrine of the Higgins case in Clark Thread Company *v.* Armitage (67 Fed. Rep., 896, 901, 902). In that case the Court said: "That a party has a right to use his surname honestly is clearly established, but in the case of a corporation there is no such thing as a surname or a Christian name." * * * "The defendant's company is an artificial person; its name is 'The William Clark Company'; it has no Christian name and no surname; its name is not Clark' or 'Clarks'; it began its existence in May, 1891. It is no answer to say that 'Clark' is a part of its name; so are the letters O. N. T. If it were incorporated under the name of 'The Clarkson Company,' the argument would be equally available. The defendant cannot escape the charge of unfair competition by alleging that he is using the corporate name, for he is not. *He is using complainant's trade name, and the fact that complainant's trade name happens to be a part of the name of the corporation which he represents does not give him a right to use it.*" * * * "In the recent case of Higgins Co. *v.* Higgins Soap Company, 144 N. Y., 462; 39 N. E, 490, the leading cases have been collected and the law applicable to this subject is

clearly stated. The facts in that case are very similar to the facts here." * * * "The general principles of law as there enunciated may be considered as furnishing a rule for this case."

The doctrine of the Higgins case was approved by the Supreme Court of Iowa, in Grand Lodge *v.* Graham, 96 Iowa, 592; by the U. S. Circuit Court of Appeals, Seventh Circuit, in the case of Peck Bros. & Co. *v.* Peck Bros. Co., 113 Fed. Rep., 291, 302, and in other cases that are collated in Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. R., 357, 367, 368.

In the Court of Appeals of the First Circuit, the principle is concisely stated that the ordinary inherent right of every person to the honest use of his own name in business, provided it be honestly used, is *not applicable to corporations* which have *appropriated surnames* for use in connection with proprietary articles.

> LePage Co. *v.* Russia Cement Co., 51 Fed. Rep., 941, 943.

Other cases in which the unfair use of corporate names has been enjoined are Chickering *v.* Chickering, 120 Fed. Rep., 69; International Silver Co. *v.* Wm. G. Rogers Co., 113 Fed. Rep., 291; S. C. (C. C. A.), 118 Fed. Rep., 133; International Co. *v.* Rogers Co., 110 Fed. Rep., 955; Garrett *v.* Garrett, 78 Fed. Rep., 472.

The legal principle enunciated in the foregoing authorities has recently been recognized and enforced by the British Court of Appeal, in the case of Valentine Meat Juice Company *v.* Valentine Extract Co., Lt., and others, 17 Patent & Trade Mark Cases, 673, 684; S. C., 83 L. T. N. S., 271. In that case, it appeared that the plaintiff was a corporation organized under the laws of the State of Virginia, U. S. A., and that the defendant was formed in Great Britain under the "Companies' Act." The defendant company was organized by one Charles Richard Valentine, *who was managing director and the*

principal stock holder of the defendant company. Plaintiff's product was a meat juice sold under some designation of which the name "Valentine" formed a part, as, for example, "Valentine's Meat Juice," "Valentine's Extract," and in some cases it was asked for, sold, or referred to as "Valentine's" simply. Defendant's product was known as "Valentine's Meat Globules," or "Valtine Meat Globules." In referring to the defendant company, Rigby, L. J., observed: "I begin with and mainly go upon the name of the company—the Valentine Extract Company, Limited. I confess I am utterly unable to follow Mr. Upjohn's argument upon that point, that the man was only trying honestly and with proper precautions to make use of his own name. *The Valentine Extract Company, Limited, is not the name of any man; it is an artificial name intended for a purpose*, and when I am told, as the learned Judge found in the Court below, that 'Valentine Extract' was a name for a famous and most valuable meat juice, more properly called, perhaps, 'meat juice' but still known as 'Valentine's Extract,' I cannot doubt the object and intention of this man—at any rate the very clear and necessary intention of a man who cannot be supposed to be ignorant of the effect of what he does. I should say that perhaps ninety-nine out of a hundred people who read that name, the Valentine Extract Company, Limited, would come to this conclusion, that it was a company for the purpose of dealing in 'Valentine's Extract.' 'What is Valentine's Extract?' they would go on to ask. 'Oh, it is a most valuable product, and one that has been for many years of great importance with sick people.' But they say nothing about the possibility of using it as a food; therefore the *prima facie meaning of the name which they chose, was not to refer to 'Valentine,' the individual, but to 'Valentine's Extract,' the product, and by that means to get the advantage of the reputation which had attached itself to the product.* Some attempt was made to

say that really it was 'Extract Company' and 'Valentine' (in a way that I could not understand at all) did not mean 'Valentine's Extract,' but it was the 'Valentine Company,' which is an 'Extract Company. *To me it seems the plainest thing that ever was, that 'Valentine Extract' was deliberately chosen in order to have it believed that the company were the makers of and dealers in 'Valentine's Extract,' and no one was called upon to know anything about the name of an individual at that stage.*"

In the case at bar, it is equally plain that the name, "Remington-Sholes Typewriter Company," and "Remington-Sholes Company" were not the names of *any individuals* but were *artificial* names invented for the purpose of diverting appellees trade to the predecessors of Fay-Sholes Company, as hitherto pointed out. Those names, as well as the name "Remington-Sholes," were deliberately chosen in order to have it believed that said corporations were the makers of and dealers in "Remington" typewriters, or a species thereof, or a new and improved Remington, *and had no reference whatever to Franklin Remington, the individual,* who was wholly unknown in the typewriter trade, and had no independent reputation in the market. The name "Remington" was chosen for Remington-Sholes Typewriter Company and associated with its product in order to derive a substantial benefit from the reputation of "this great name" in the market.

Fifth. Corporations which do not inherit their names, but assume them voluntarily, may not use their assumed names if such use shall result in the confusion and deception of the public and the displacement of the good will of another's business.

It was said by Giffard, L. J.: "I quite agree that they (Complainants) have no property right in the name ("Guinea Coal Company"), but the principle

upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should *assume* the same name, or the same name *with a slight alteration* (Pall Mall Guinea Coal Company) in such a way as to induce other persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

Lee *v.* Haley, L. R., 5 Ch. App., 160, 162.

In the Higgins case (144 N. Y., 468, 469) the New York Court of Appeals said: "The courts interfere in these cases, not on the ground that the State may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive. *The names of corporations organized under general laws, and in most other cases, are chosen by the promoters, and it would be an easy way to escape from the obligations which are enforced as between individuals, if a corporation were granted immunity by reason of their corporate character.* The principle upon which courts proceed in restraining the simulation of names in the nature of trade-marks, and have come to designate the business of a particular person or company, is stated in Lee *v.* Haley (L. R., 5 Ch. App., 155). * * *

The cases are not infrequent in which the use of corporate names has been restrained on the principle of the trade-mark cases. (Holmes, Booth & Haydens Mfg. Co. *v.* Holmes, Booth & Atwood Mfg. Co., 37 Conn., 278; Massam *v* Thorley Cattle Food Co., L. R. (14 Ch. Div.), 748; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. Rep., 94; Newby *v.* Oregon Central Railway Co., 1 Deady, 609; Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co., 11 Fed. Rep., 495; The Le Page Co. *v.* The Russia Cement Co., 51 Id., 942)."

The principle, enunciated above, is illustrated and was enforced in cases hitherto cited and particularly in Wm. Rogers Mfg. Co. *v.* R. W. Rogers Co., 66 Fed. Rep., 56; S. C. 70 Fed. Rep., 1017; Garrett et al *v.* T. H. Garrett & Co., 78 Fed. Rep., 472; Stuart *v.* F. G. Stewart Co. et al., 91 Fed. Rep., 243; Meyer *v.* Medicine Co., 58 Fed. Rep., 884; De Long *v.* De Long Co., 89 Hun, 399; S. C. 35 N. Y. Supp., 509; Peck Bros. & Company *v.* Peck Bros. Co., 113 Fed. Rep., 291, and in many other cases.

Sixth. The fact that the Illinois corporations had a large field from which to select their names, and yet took one similar to that of complainant-appellee is a clear indication of their intention to pirate appellee's good will.

Celluloid Co. *v.* Cellonite Co., 32 Fed. Rep., 97.

Seventh. Where the name (of defendant) is selected for use because of its similarity to that of plaintiff, fraud is evident.

Taylor *v.* Taylor, 25 L. J. Eq. N. S., 255; Landreth *v.* Landreth, 22 Fed. Rep., 41; Meyer *v.* Bull Medicine Co., 58 Fed. Rep., 884; Peck Bros. & Co. *v.* Peck Bros. Co., 113 Fed. Rep., 291.

Eighth. The fact that the Illinois corporations used a different name from complainant-appellee's true corporate name, is of no consequence so long as the trade-names of appellee were employed.

Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. Rep., 94, 97.

In Le Page Co. *v.* Russia Cement Co. (51 Fed. Rep., 941) the complainant's trade names were "Le Page" and "Le Page's Glues."

In Butterick Publishing Co., Ld., *v.* Standard Fashion Co., reported in the New York Law Journal, March 21, 1896, plaintiff's trade-name consisted of the word "Delineator."

In Gray et al. *v.* Taper-sleeve Pulley Works, 16 Fed. Rep., 436, complainant's trade-name was "Taper-Sleeve Pulley Works."

In Meyer *v.* Bull Medicine Co., 58 Fed. Rep., 884, complainant's trade-name consisted of the words "Bull's Cough Syrup" and "Dr. Bull's Cough Syrup."

In Massam *v.* Thorley's Cattle Food Co., L. R. 14 Ch. Div., 748, the plaintiff's trade-name consisted of the words "Thorley's Food for Cattle."

In Fuller *v.* Huff, 104 Fed. Rep., 141, complainant's trade-name consisted of the words "Health Food Company."

In the Clark Thread Co. *v.* Armitage (67 Fed. Rep., 901) the Court said: "He (defendant) is using complainant's trade-name, and the fact that complainant's trade-name happens to be a part of the name of the corporation which he represents, does not give him a right to use it."

In the courts below counsel for defendant-appellants contended that Franklin Remington in virtue of his being the son of Samuel Remington, and by reason of his relationship to the Remington family, might contribute his patronymic to the Illinois corporations, for their advancement and prosperity, as he had theretofore done. Counsel endeavored to support their contention by postulating an honest, necessary and proper use of the name "Remington" in connection with said corporations and their product—which was and is denied—and by quoting excerpts from decided cases whose facts are unlike and clearly distinguishable from those in the case at bar. In answer to the contention of the learned counsel of defendant-appellants the Circuit Court said:

"That these Remingtons are descendants of one of the original Remingtons, and Sholes a descendant of an inventor of some part of the original typewriters, is set up and relied upon as establish-

ing a right to the use made of the names "Remington-Sholes" in this connection. No right descended, however, in those respects from any of these ancestors to any of these persons; and this excuse has no legal foundation, but is entirely sentimental. They were situated as to this as any other party of the same name would have been, with no standing but their own natural rights to the use of their own name in the transaction of their business. That all persons have respectively the right to use their own names in their own business is entirely clear, but this right is subject to the limitations common to all rights, that it is to be so used as not to injure the rights of others. These Remingtons were not themselves manufacturers of typewriters, and did not start in as nor become such in their own names, nor have their own names put upon machines of their own make; but they gave their name to a large corporation as a distinct entity, which took the name into its typewriter business and put it upon the typewriting machines of that corporation, whereby they undertook to confer the right to the use of that name upon that entity for the benefit of others who had no right to use it at all. This was not a legitimate exercise of the natural right to use their own name in their own business. This was going far beyond their own rights, and was undertaking to give what they did not have, and their own natural rights to the use of their own name in their own business became thereby so mingled with the unlawful use of it for the benefit of others, that it is indistinguishable here. They lost their identity in that of the corporations."

The Court of Appeals said: "The corporation defendant and its predecessor, the typewriter company, acquired their names by the selection of the individuals who organized them. Obviously there was no necessity that either of them should take the name "Remington" either alone or in combination. The junior Remingtons contributed money to the enterprise and gave, at

least one of them did, time and services to its promotion, but they were very far from being the entire corporation; the corporation was a separate entity from them; they chose not to prosecute the typewriter business themselves; had they done so good faith toward those dealing with them might make it necessary to use their own name; they chose on the contrary to associate themselves with others in a corporation whose name its organizers were free to select."

In this connection it is to be borne in mind that Samuel Remington, the father of Franklin Remington and Carver Remington, and his brothers had long prior to the sale of the typewriter business to Wyckoff, Seamans & Benedict in 1886, vested all their right to the use of the name "Remington" in connection with the manufacture and sale of fire arms, typewriting machines, etc., in the corporation of E. Remington & Sons, of which they were stockholders. *The typewriter enterprise was initiated and always carried on by E. Remington & Sons corporation and not by any of the Remingtons individually.* The proofs herein show that Samuel Remington died about December, 1882, and that in September, 1883, the administrators of his estate transferred to Philo Remington, one of the brothers, all of Samuel's interest in the corporation, E. Remington & Sons, consisting, mainly, of shares of stock which he had owned in the capital stock of that corporation. Subsequently and in 1886, the whole typewriter branch of the business of E. Remington & Sons, including the trade-names, trade-marks and the good will thereof, was conveyed to appellee's predecessors. Inasmuch as all the right and title of Samuel Remington and of his brothers to the use of the name "Remington" in connection with typewriting machines were vested in E. Remington & Sons corporation, and subsequently passed to its successors and to the complainant-appellee herein, it is not seen that any right to use the name "Rem-

ington" in connection with typewriting machines was reserved to, or descended, or vested in Franklin Remington and Carver Remington, heirs and next of kin of Samuel Remington, or that by reason thereof they could, as against appellee, resume the use of that name in connection with typewriting machines any more than they could take possession of any other property originally owned by the corporation, E. Remington & Sons. In other words Franklin Remington and Carver Remington at the time of the organization of the Illinois corporations, stood in respect of the use of their patronymic in the same position as if they were not related to Samuel Remington, deceased, or to those members of the Remington family who were stockholders and directors of E. Remington & Sons corporation.

In the brief and argument of counsel for appellants, in the court below, much stress was laid by them on the value of "family reputation," "pride of ancestry," and the right of every individual to avail of the full benefits and advantages to be derived from a good name established by the labor and integrity of an ancestor, etc., and in that connection an excerpt was quoted from the opinion of the N. Y. Supreme Court at general term, in the case of Meneely *v.* Meneely, 1 Hun, 367. While the remarks quoted were doubtless in the circumstances of that case proper, they were nevertheless *obiter dicta*, as will be clearly manifest by reference to the opinion in the case and to that of the New York Court of Appeals, 62 N. Y., 427. The facts in the Meneely case were essentially different from those in the case at bar. Andrew Meneely, the father of the plaintiffs and of the defendant Meneely, had for many years carried on the business of bell founding at Troy, New York, and possessed personal skill and reputation therein.

The plaintiffs, who were sons of Andrew Meneely, continued to carry on the old business at Troy, N. Y., and another son with one Kimberly commenced

manufacturing bells in a different city and county on the opposite side of the Hudson River, under the firm name of "Meneely & Kimberly." The Court found that the defendant Meneely had not resorted to any artifice, or been guilty of any fraud or deceit, or done any act calculated to mislead the public as to the identity of the establishments, and further held that the injunction awarded by the Referee was too broad in scope, in that the defendant Meneely was absolutely prohibited from using his own name in his own business in any way. The case was one between members of the same family, none of whom possessed any exclusive rights as against the others, in respect to the right of each to enjoy the fruits of their father's personal reputation in connection with the business of bell founding, which was the *only* business that the father had carried on in his life time, and the only one "the son (defendant) had been instructed to follow." The Court thought it would be *unjust* to deprive the defendant of the right to use his own name in his own business in the circumstances of that case, and the remarks of the Court at General Term, quoted by appellants' counsel in the Court below, were made in discussing that point.

This Meneely case is referred to, in the opinion of the New York Court of Appeals, in the Higgins case, *supra*, as an authority upon the proposition that any person may use in his business his family name, *provided he uses it honestly and without artifice or deception*, although the business he carries on is the same as the business of another person of the same name previously established.

Manifestly the New York Court of Appeals, in the Higgins case, found nothing in the Meneely case, which conflicted with the proposition "that the defendant derives no additional immunity from the fact that the name of 'Higgins' in the corporate name was that of one or more of its corporators, or that Charles S. Higgins or any one of that name,

might engage in the soap business under the family name, or that Charles S. Higgins and the other corporators of the same name had consented to its use."

COMPLAINANT'S RIGHTS ARE EXCLUSIVE AS AGAINST DEFENDANTS-APPELLANTS.

That another may have the right to use a particular name, as well as complainant-appellee is unimportant, if appellee's right be exclusive as against appellants.

Newman *v.* Alvord, 51 N. Y., 189, 195.
Wm. Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co., 11 Fed. Rep., 495.
Croft *v.* Day, 9 Beav., 88.
Clark Thread Co. *v.* Armitage, 67 Fed. Rep., 896, 904.
S. C. App., 74 Fed. Rep., 936, 943.

In Newman *v.* Alvord, *supra*, the New York Court of Appeals speaking through Judge Earl, p. 195, said: "It is sometimes said, in the cases to which our attention has been called, that the claimant of a trade-mark must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate. *The right must be exclusive as against the defendant. It is generally sufficient, in such cases, if the plaintiff has the right and the defendant has not the right to use it.* The principle upon which the relief is granted is that the defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the public. Here the plaintiffs had given a reputation to Akron cement in the market. They had always been its principal manufacturers and sellers, and at the time of the commencement of the suit, the sole parties who could be injured by the fraudulent use

of the trade-mark by the defendants, and, hence, they are clearly entitled to the protection which they seek."

In Croft *v.* Day, *supra*, Lord Langdale, M. R., said: "My decision does not depend upon any peculiar or exclusive right the plaintiffs have to use the names of Day & Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public."

MEASURE OF RIGHT TO USE A NAME.

While a person may not in general be deprived of his right to use his own name, the name must be *as his own name* and not as *the name of his goods*, when the latter use would tend to displace the good will of another whose goods were known by the same or a similar name. In the Duryea case (101 Fed. Rep., 117) the court said that a second comer by the name of Duryea could not put his product on the market under the name of "Duryea's starch."

RIGHT TO A NAME NEED NOT BE EXCLUSIVE.

The rule is well stated and cases cited in Shaver *v.* Heller & Merz Co., 108 Fed. Rep., 821, 825, 826. The Circuit Court of Appeals of the 8th Circuit, speaking by Judge Sanborn, said: "Another proposition of counsel for the appellant is that the appellee has, and can have, no proprietary interest in the word 'American' or in its exclusive use; and therefore it is entitled to no injunction to restrain its use by another. But an ownership and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin its perpetration. A title to the property about to be injured is sufficient. One gathers the seeds of pernicious weeds, and threatens

to sow them on the field of his neighbor. The latter has no proprietary interest in the seeds, but he owns the field, and the crop it is producing, and these facts are sufficient to warrant any Court in granting summary relief by injunction against the threatened injury. The appellants scatter throughout the land, for the purpose of deceiving the public and diverting to themselves the trade, custom, and good will of the appellee, words and names which convey the false statements that the goods they are selling were made by the Heller & Merz Co. That company has no property in the words or in the means by which this fraud is committed, but it owns the good will—the custom—which the false and fraudulent use of these words and names injures and destroys; and its proprietary interest in this good will is ample to warrant the Court in enjoining its destruction by the fraud. * * * It is sufficient that the complainant is entitled to the custom—the good will—of a business, and that this good will is injured or is about to be injured by the palming off of the goods of another as his. * * * This is not a suit for the infringement of a trade-mark. It is a suit for unfair competition for selling goods of the appellee as those of another. For this reason no proprietary interest in the word 'American,' or in the names whose use is enjoined was essential to the issue of the injunction."

It is not material in this case whether the name "Remington" is or is not a lawful technical trade-mark, for the right of the appellee to the use of this name is so far exclusive as against the appellants that the Court will treat the name as a descriptive term to the benefit of which appellee is entitled.

Garrett *v.* Garrett Co., 78 Fed. Rep., 472; De Long *v.* De Long Hook & Eye Co., 32 N.Y. Supp., 203, 204; Clark Thread Co. *v.* Armitage, 67 Fed. Rep., 896; S. C., 74 Fed. Rep., 936; Koehler *v.* San-

ders, 122 N. Y., 65, 74; Montgomery *v.* Thomson (1891) App. Cas., 217; Wotherspoon *v.* Currie, 5 L. R. H. L., 508; Reddaway *v.* Banham (1896) App. Cas., 199; Valentine Meat Juice Co. *v.* Valentine Extract Co., 83 L. T. N. S., 271.

CONFUSION IN BUSINESS AND DECEPTION OF THE PUBLIC.

The use by the Howe Scale Co. and the Remington-Sholes Company of the names "Remington," "Remington * * * Company," etc., was calculated to produce and cause confusion in the mind of the public and in the business of appellee, and the public and purchasers and users of writing machines were mislead, and caused to believe that the typewriters manufactured by the Remington-Sholes Company, and sold by defendant-appellant were of appellee's manufacture, and were "Remington machines," or a species thereof, or a new and improved "Remington," and that the Remington-Sholes Company's business and its machines had some connection with the complainant-appellee.

I. The Howe Scale Company and its principal, the Remington-Sholes Company, admitted that there was confusion in the minds of the public as regards the connection of the Remington-Sholes Company with the "Remington" typewriter. In other words, it was a conceded fact in this case that the defendant-appellant and the Remington-Sholes Company had used and were using, in their business and upon their machines, a name which led, or was likely to lead, the public to believe that the Remington-Sholes Company was *connected* with the appellee and manufactured the Remington typewriter.

For example, in Complainant's Exhibits, "Remington-Sholes Company's catalogue, Sept. 16, 1898," (p. 22), "Rem-Sho catalogue" (p. 21), "Rem-Sho booklet" (p. 24), "Remington-Sholes-McGurrin catalogue" (p. 24), being catalogues from time to time issued by the "Remington-Sholes Company," and circulated by the defendant-appellant, it is said: "The question is *often* asked, 'What *connection* has the Remington-Sholes Company with the Remington Standard Typewriter?' And again they say, 'We are sometimes asked about the right of the Messrs. Remington and Sholes to the use of their own names in connection with typewriters?'" * * *

In the **Phonographic World** of June, 1897, which is published in the City of New York, and is circulated extensively throughout the United States, and to some extent in foreign countries, an article appears under the signature of Franklin Remington, the alleged manager of the Remington-Sholes Company, describing the structure and mode of operation of the so-called Remington-Sholes or Rem-Sho No. 2 Typewriter. This article will be found on pp. 392, 393 and 394 of said publication. It was prepared by Franklin Remington, and published by him on behalf of the Remington-Sholes Company and the defendant-appellant in this case (R., p. 228). An advertisement of the defendant-appellant also appears on the back cover of this publication. In Mr. Remington's article (p. 394), he says: "Though we have been making typewriters for the past three years, *we are still asked at times what connection has the Remington-Sholes Company with the Remington Standard Typewriter.*"

Defendant-appellants' witness, **Romig,** testified on cross-examination as follows: "*I recall on several occasions people coming into the office to look at typewriters asking me, 'Is this the Remington machine?'* To which I always replied that it was not, and endeavored to explain to them just what this machine was, namely, the invention of a machine of one of the original descendants of the

older Sholes, *inventor of the Remington typewriter*. In other words, a *second generation* of typewriter inventors and manufacturers, *in the later case bringing in Mr. Franklin Remington as manager of the Remington-Sholes Company.*

R., p. 1135.

At another place in his testimony Romig stated: "At the time I was engaged as stenographer and salesman in the office of the Howe-Scale Company. Mr. Frank Remington gave us a brief history of the manufacture of the machine, stating that Zalmon G. Sholes, a descendant of the original Sholes, *who invented the "Remington Standard" machine* (which was an untrue statement), had invented the "Rem-Sho" machine; and that he, Mr. Franklin Remington, was also a descendant of the original Remington connected with the old Remington Standard Typewriter. *He told us not to confuse the name Remington in the sale of the Rem-Sho machine or lead people to think that we were selling the Remington machine.*

R., pp. 1139, 1140.

George A. Baldwin, who had been the general organizer of the typewriter business of the Remington-Sholes Company since Jan. 1st, 1898 (R., p. 1004), testified that he had been approached by salesmen and dealers relative to the use of the name Remington-Sholes by defendant-appellant's company, and had explained to them the origin of the name, etc. (R., p. 1043).

In his direct testimony he says: "I told Mr. Scorer (then a salesman for appellant) to sell the machine strictly upon its merits; that the machine was good enough to sell, and *that we did not want any misrepresentations or deception in any manner.*"

R., p. 1017.

Baldwin states that Mr. Fay called his attention to that portion of the catalogue under the heading "In regard to our name."

R., pp. 1006, 1041.

He said "The question was brought up for the reason that it was sometimes asked who Mr. Remington and Mr. Sholes were, and of course I wanted to be informed on the matter. (R., p. 1041). This question was asked by salesmen and prospective buyers he thought from *natural* curiosity. (R., 1042).

In cross-examination he further testied as follows:

xQ. 193. Do you mean to say you have no idea why they asked the question, and you wish the Court to understand that you do not know?

A. *I think it would be a natural inquiry, owing to the similarity of names of another machine,* especially among people who are familiar with typewriters and their makers.

xQ. 194. *What other machine do you refer to in your last answer?* A. *The machine manufactured by Wyckoff, Seamans & Benedict, the Remington typewriter.*

xQ. 195. *Then it was because there was a machine upon the market known as the Remington typewriter that the inquiry was made of you about the use of the name "Remington" in connection with the "Remington-Sholes" or "Rem-Sho" typewriter, and the Remington-Sholes Company; is that correct?* A. *Yes, sir; that is true, I think.*

xQ. 196. *How frequently was that inquiry made of you by prospective purchasers or dealers or agents?* A. *I am unable to state that; it was made now and then, not always.*

xQ. 197. *But frequently?* A. *Well, yes; now and then.*

R., p. 1043.

V. E. Williams, another of the appellant's witnesses, testified:

"I remember distinctly interrogating Mr. Scorer (appellant's agent) respecting the meaning or signification of the name 'Rem-Sho,' *and of insinuating that it would be likely to deceive the unwary, after his explanation that 'Rem' stood for Remington.*"

R., p. 1225.

Another of appellant's witnesses, **Hamlin E. Hatch,** testified that *he had been asked by dealers and by prospective buyers of typewriters whether the Rem-Sho machine or Remington-Sholes Company had any connection with the so-called "Remington typewriter."*

R., pp. 1061, 1062.

W. De Saussure Trenholm, who was in charge of the typewriter department in the office of the Howe Scale Company, or Page, Dennis & Co., 341 Broadway, New York City, says (R., pp. 1250, 1252), "When the office was opened at 341 Broadway *Mr. Franklin Remington* came here from Chicago, and in a conversation with me explained how the Remington-Sholes typewriter got its name, *and gave me to understand that that explanation should be made in response to any inquiries on the subject.*" * * *

In cross-examination reference was made to his answer to direct question 23, above quoted, and he was requested to state all that Mr. Remington said on that subject at the time of said interview. He answered as follows: "As well as I remember it *Mr. Remington said that Mr. Sholes had invented the machine* and brought it to him with the idea of manufacturing it; that they proceeded to make the machine, and that Mr. Fay took some interest in the undertaking, and at his suggestion the machine was called the 'Rem-Sho;' *as a compound abbreviation of the two names; that he and Mr. Sholes were the sons of the two men who had in-*

vented and started the manufacture of the Remington Standard typewriter, but that their interests were entirely disconnected, and that this should be told in response to any inquiries as to the origin of the name Rem-Sho. This is as near as I can recall the conversation."

R., pp. 1257, 1258.

In xQ. 66 (p. 1262), the witness was requested to state *the names of salesmen and the instructions which he gave them on the subject of taking care to distinguish between the two machines*, and after naming the salesmen, he said: "To all these I explained the origin of the name Rem-Sho *and told them that this explanation was to be given in response to any inquiries as to where the name came from.* They were not directed further than this, except that *it was understood that they were to avoid confusing our machine with the Remington Standard, where it appeared that such confusion seemed likely.*"

He further testified that in his explanation to his salesmen he stated to them that "It (Remington-Sholes machine) was invented *by the son of the man who invented the Remington Standard Typewriter, and is being manufactured by the son of the man who started the manufacture of the Remington Standard Machine.*"

R., p. 1263.

Being asked as to what instructions he gave the salesmen in respect to taking care to distinguish between the two machines, he answered: "Nothing more than that the machines were entirely different, so far as business connections were concerned, and that in using the name Remington in their explanation of the machine and its merits that *he was the son of the original Remington typewriter man,* * * * and that the business interests of the two machines were separate and apart."

R., p. 1263.

Trenholm's description of Mr. Remington's explanation to a *prospective* customer is illuminative in this connection.

R., p. 1266.

In answer to xQ. 80 (1266) the witness testified: "Upon Mr. Remington's arrival here, he and I went out together to sell a machine, and I listened to his statements concerning it to the *prospective customer, and when the customer inquired what relation existed between our machine and the Remington Standard, Mr. Remington explained what I have heretofore stated about the relationship of the two typewriters, and on leaving this office he told me that this explanation should be given in response to such inquiries.*"

In answer to xQ. 87 (p. 1268), as to whether or no inquiries had been made of him while manager of the typewriter department at 341 Broadway, concerning the *connection* between the Rem-Sho machine, so called, and the Remington Standard Typewriter by *prospective* customers or other persons, he said: "*I think that question was asked me at different times*, but I do not now recall any particular instance at which it was made or any particular person who made it."

In answer to RDQ. 109 (pp. 1272, 1273), the same witness said: "*I remember very distinctly that on one occasion a man came up to the typewriter department and asked me whether that was the Remington Standard Typewriter* which I had there (indicating one of the Remington-Sholes machines which was on a table nearby). *I told him no, that it was the Remington-Sholes Typewriter; that the Remington Standard Typewriter office was on the block below; whereupon he left the office and did not return, although I offered to show him one of the machines I had for sale.*"

This inquiry was made by a prospective purchaser, who had been decoyed into the store of the defendant, which was located on the same

street, a short distance above the New York office of the complainant-appellee, being attracted thither, no doubt, by the words "Remington-Sholes Typewriters," which were painted on the front show windows of defendant-appellant's store.

R., p. 1256.

Thomas O. Parker was employed as a salesman in the office of the Howe Scale Company, 341 Broadway, New York City, from the 1st of January, 1898, until some time in September of the same year.

R., pp. 1274, 1275.

Being interrogated as to whether or no he had received any instructions from the defendant-appellant or its company, in regard to any explanation which should be made in answer to inquiries respecting the name of the "Rem-Sho" machine, or the "Remington-Sholes Company," he answered: "Only in this regard, *that we were instructed in case inquiries were made regarding any possible connection with the Remington Company that we were to say that there was no connection whatever between the two companies.*"

R., p. 1278.

It appears from Parker's testimony that **Mr. Weingart** visited the store of Page, Dennis & Co.—the appellant's sales office—*for the purpose of purchasing a Remington typewriter.*

R., pp. 1282, 1287, 1288, 1295.

In his direct examination he was asked whether or not he told Mr. Weingart where or by whom the Remington Standard Machine was being sold, and he answered: "I do not recall that, *but I know I told lots of people who came there inquiring about the Remington machine and where it was sold and just where their office was.*"

R., p. 1283.

Referring to the instructions given to him by Franklin Remington and Trenholm, in regard to distinguishing the Remington-Sholes machine from the Remington machine, Parker said: "*I never sold a machine nor did I ever place one on trial with any one without explaining the difference between the Rem-Sho machine and the Remington Standard.* I mean by this that I explained to them that the machines were entirely different in every way, both as to construction and manufacture, *that they were made by different companies. I do not think I ever sold a machine to a party to whom I did not state that the manager of our company, Mr. Franklin Remington, was the son of the man who first manufactured the old Remington machine, and that our Mr. Sholes was the son of the inventor of the old Remington machine, and add that they were entirely different companies, and I would usually wind up in a joking way by saying: 'You see it is a case of father against son.'*"

R., pp. 1286, 1287.

In cross-examination he was interrogated as follows:

xQ. 64 "Did you always volunteer this information or was it given in answer to or explanation of inquiries made by the purchasers or prospective purchaser? A. Sometimes I volunteered it and sometimes it came out in the course of conversation. *I always was particular about the point of it not being a Remington machine, and when I did not volunteer the information, the question naturally was asked me then about the manufacture of the machine.*"

R., p. 1288.

A little further on in his deposition **Parker** was interrogated as follows:

xQ. 67 "And when you did not succed in your endeavors to sell Rem-Sho machines to inquirers

for the Remington machine you sent them down to the Remington store or told them where they could buy a Remington make? A. *I don't think I said that I sent all parties who inquired about Remington machines to the Remington office.* I think I said parties who inquired for the *Remington office.* Whenever it was asked me where a Remington could be bought I gave the desired information, that is, I told them where the Remington office was located.

xQ. 68. But as you before stated you tried to sell such parties a Rem-Sho machine; is that right? A. *Yes, I tried to* sell anybody who came in a Rem-Sho machine.

R., p. 1288.

In cross-examination Parker, being asked whether *Franklin Remington told him never to allow a customer to think that the Remington-Sholes Company was in any way connected with the Smith Premier Company or any other typewriter company than the Remington Company, answered no.* Franklin Remington's admonitions were confined entirely to the so-called Remington Company, that is to say, the concern which manufactured the widely known Remington, or Remington Standard typewriter.

R., pp. 1297, 1298.

Frank L. Sholes, who was in the service of the defendant-appellant's company from January, 1895, until March, 1900, in answer to the inquiry whether or no he had received any instructions in regard to the sale of Rem-Sho typewriters, he said: "*I had always been told not to confound the name Remington-Sholes with that of the Remington Standard.*"

R., pp. 1160, 1169, 1170.

Joshua T. Gillelan testified that he was employed in selling the Remington-Sholes typewriter in Baltimore, Md., from about March, 1898, until January 1st, 1899.

R., pp. 1325, 1326.

He said, among other things: "I was told by Mr. H. I. Seddon, who was at that time manager of the typewriter department for the Howe Scale Company, that the Rem-Sho was in no way connected with the Remington Typewriter Company, *and that I should explain to people that it was not, in order to avoid any confusion that might arise.*"

R., p. 1331.

This witness testified that *people occasionally inquired as to the connection of the Remington-Sholes Company with the so-called Remington Company.*

R., pp. 1334, 1335.

Mr. Seddon did not say to the witness that he was to explain to people or prospective purchasers of typewriting machines that the so-called Rem-Sho typewriter was in any way connected with the *Smith-Premier* or the *Barlock* typewriter, or any other typewriter company, in which the name "*Remington*" was not associated.

R., p. 1336.

Walter M. Wilgus, a salesman of the appellant's company, testified: "*It has been asked by a number of parties, 'Have you any connection with the Remington Company?'* and I would then explain that we had no connection whatever with the Remington Standard typewriter, and invariably referred them to that part of our catalogue, which is marked 'In regard to our name.'"

R., p. 1350.

In cross-examination, Wilgus was interrogated, and answered as follows:

xQ. 87. "And it is your judgment, is it, *that the association of the name Remington with the so-called Rem-Sho machine has been of advantage to the Remington-Sholes Company or its agents in the sale of their machine? A. In some cases it has, while in other cases some people have hesitated on that account.*

xQ. 88. *Why did they hesitate on that account?* A. *On account of the name Remington they would often want to be assured that they were in no danger of any liability from using this new machine Rem-Sho.*

xQ. 89. *They hesitated, were reluctant to take it on account of the use of the name Remington; is that what you mean?* A. *Yes, sir.*

R., p. 1349.

Wilgus also testified that *while he was in the office of the Howe Scale Company in Philadelphia inquiries were made whether or no that was the Remington office or the place where the Remington machine was sold.*

R., p. 1349.

Now from the appellants' catalogues and publications and from the mouths of their own witnesses, it appears:

1. That *the public believed* and was under the impression *that there was some sort of business connection, or relationship, existing between the Remington-Sholes Company and the appellee's machine, known as the "Remington" typewriter.* In other words, that appellant's company was making and selling a Remington typewriter or a species thereof, or a new and improved Remington.

2. People frequently came to appellant's offices to examine machines *and inquired if appellants sold the Remington typewriter.*

3. Appellants cautioned their salesmen not to *confuse* the name "Remington" in the sale of defendant's machine, or lead people to think it was a Remington typewriter. This shows a liability to confusion in business.

4. *They cautioned their agents and dealers against making any misrepresentations or practicing deception.* The reason is manifest.

5. That the inquiry was a *natural* one, owing to the *similarity of names* between appellee's business and machine, and that of appellant's principal.

6. This inquiry was *frequently* made by *prospective purchasers* of typewriters, and by dealers and agents of defendant-appellant and its principal.

7. The suggestion was made to appellant's agent, that the use of the name "Rem" or "Remington" was likely to deceive the "*unwary*" purchaser of writing machines.

8. Appellants say that their salesmen were *cautioned to be careful* not to allow any one to get an *erroneous* impression as to the origin of the Rem-Sho machine, and the *status* of the two concerns.

9. *The appellant displayed the words "Remington-Sholes Typewriters" upon the windows of its sales office, which was a short distance above the store of appellee, located upon the same street, and prospective purchasers came into appellant's store for the purpose of purchasing Remington typewriters.*

10. *Lots of people called at appellant's store at No. 341 Broadway, New York City, making inquiries about the "Remington" machine.*

11. Appellants say that they always explained that the machines were made by different concerns, *but always endeavored to sell "Remington-Sholes" machines to the persons making the inquiries*, who were doubtless *decoyed* into defendant-appellants' store by the name "Remington" which was displayed upon the signs.

12. Appellants' agents were instructed to make the explanation *in order to avoid any confusion that might arise.*

13. *People hesitated about purchasing the Remington-Sholes machine, because the name Reming-*

ton was used in connection therewith, and purchasers were afraid of being liable for infringement.

14. In all explanations given by the appellants' agents, *the name* "*Remington*," in connection with Mr. Franklin Remington, was put forward as an important factor, and used to aid in selling the so-called Rem-Sho typewriter.

15. Appellants' witnesses also represent that *Mr. Franklin Remington*, in giving them a history of the manufacture of the Remington-Sholes machine, and which history they were instructed to impart to the purchasing public, *stated that Mr. Sholes' father invented the "Remington-Standard machine," and that he (Remington) was the son of the man who first manufactured it.* As was said by Collins, *J.*, in the Valentine Meat Juice Company case, this statement *was* untrue.

The fact that the defendant-appellants and the Remington-Sholes Company, and their officers, cautioned their salesmen, dealers and agents not to permit deception is evidence against them as showing that they doubted the propriety of the use of the name "Remington," and that they believed such use was likely to create confusion and mislead intending purchasers.

In Glenny *v.* Smith, 2 Drew & Sm., 476; S. C., 11 Jurist. N. S., 964, it was held that the fact that the defendant had cautioned a shopman not to permit deception, was evidence against the defendant, as showing that he doubted the propriety of his use of the name which he employed in his business.

Had appellants not used *a name so similar to that of the appellee, as to be calculated to create confusion in business and to mislead and deceive the public, there would have been no necessity whatever for cautioning their salesmen, agents and dealers, or purchasers of typewriters, that the Remington-Sholes Company had no connection with*

the Remington or Remington Standard typewriter.

Their own acts, admissions and publications are persuasive evidence that their use of the name Remington was calculated to confuse their business and machine with that of appellee's; *but they hoped by cautioning their agents, dealers, etc., to escape liability for infringement.*

If the names used by the appellants were so unlike those of the appellee that confusion and deception were not likely to occur, why this constant warning of their agents and the public that their writing machine was not of appellee's manufacture, and that the Remington-Sholes Company had no connection with the Remington typewriter, or Remington Standard typewriter.

In Pillsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 Fed. Rep., 841, 848, 849, the Court said: "It may be remarked, in passing, that if these brands are so dissimilar that the 'most casual observer' cannot be imposed upon, why assure purchasers, wholesale and retail dealers, who are expected to be, and are naturally, more careful than a purchaser of a single package, that the goods were not the product of the Pillsbury Mills." To same effect are Walter Baker & Co. *v.* Baker, 77 Fed. Rep., 181, 186, 187; Chappell *v.* Davidson, 2 Kay and J., 123; S. C., 8th De G., M. & G., 1.

Appellants' counsel in the court below said that: "While the appearance of the name 'Remington' in the *corporate* name of the Remington-Sholes Company may tempt the curiosity of some persons to inquire as to the existence of a *connection* between such company and complainant, the use of the name 'Sholes' in such corporate name is a distinction so prominent that no reasonable person can fail to recognize it, and if vested with common intelligence to understand its significance."

And again counsel said: "When the Remington-Sholes Company and its predecessor entered the field the complainant had a world-wide reputation.

It was but natural, therefore, that salesmen of the Remington-Sholes Company and its predecessor should be *often asked if any connection* existed between such companies and complainant. However strenuously it may be argued that the asking of such questions indicates confusion in the mind of the public, we submit that it warrants no such inference. On the contrary the inquiry '*If* there is any connection' indicates a recognition in the mind of the inquirer of the existence of complainant as distinguished from the company concerning which such question is asked. The pertinent fact is not whether the public wondered as to the existence of any *connection* between the complainant and the Remington-Sholes Company, but whether it regarded these companies as *identical.*"

And once again counsel said: "*It may be contended that the very fact of the statements made by the Remington-Sholes Company and its predecessor in catalogues, signs, etc., to the effect that no connection existed with complainant, would indicate that there was danger of confusion arising,* but the plain answer to this is that these statements were made after the threat of complainant contained in its notice of June 16, 1894, and repeated at later dates:

In answer to these several contentions appellee says:

1. If the name "Sholes" used in the corporate names and on their product in connection with the name "Remington" clearly and adequately differentiated their machines from appellee and its product and would prevent persons of common understanding and intelligence from being misled or deceived, why did the Howe Scale Co. and the Remington-Sholes Company assure their agents and dealers and purchasers of their product that the Remington-Sholes Co. had no connection with the "Remington Standard Typewriter"?

These cautionary notices clearly show that the

names used by them *were known to be calculated to confuse and mislead the public*, and hence they were given. The contention of appellants' counsel that these notices to the public were given only in consequence of appellee's letter of June 16, 1894, forbidding the use of the name "Remington" is inadmissible without force in view of the fact that the notices show on their faces that they were issued because "*the question is* (*was*) *often asked* (*by the public*), '*What connection has the Remington-Sholes Company with the Remington Standard Typewriter?* [Italics not in original.] Manifestly it was because the public had asked the question that these notices were given, *and not because of appellee's letter*, as asserted by appellant's counsel. Counsel's attempted explanation is clearly an afterthought.

2. In respect to counsel's contention that the inquiry was "If any connection existed between such companies and complainant," the fact is to be noted that there was no "*if*" in the inquiry made of salesmen, as will readily appear by reference to the Record, pp. 886, 1434. Hence the argument of counsel in respect to the significance of the word "*if*" is not of force.

3. It is a *pertinent* fact in this case whether the public was or might be led to believe, in consequence of appellants' use of the name "Remington," that there was a *connection* between the Illinois corporations and appellee and their products. The courts below evidently thought so and it is respectfully submitted that their holdings in that respect was right. The rule is well settled that if the name taken is so identified with the plaintiff that the defendant's use of it will induce the belief that his goods are those of the plaintiff, or *that his business is an extension of, or an amalgamation with, or is otherwise connected with the plaintiff's business* and will thereby cause substantial damage, an injunction will be granted. Kerly on Trade-marks (2d

Ed.), 476. Randall *v.* British and American Shoe Co., 19 Rep. Pat. Laws (British) 393. Eastman Photographic M. Co., Ld. *v.* John Griffiths Cycle Corporation, Ld., *et al.* 15 R. P. Cas., 105, 112.

In the case last cited the court said: "I therefore grant an injunction to restrain the defendant's companies or either of them, from carrying on business under the name 'Kodak Cycle Co., Ld.' or under any name comprising the word 'Kodak' likely to mislead or deceive the public into the belief that the defendant company is the same company as *or is connected with either of the plaintiff companies*, or that the business of the said companies or either of them, is the same as, *or is in any way connected with, the business of the plaintiffs*, the Eastman Photographic Material Co., Ld."

4. Inasmuch as appellee's machine had "*a world-wide reputation*" *as the* "*Remington*," when the "Remington-Sholes Company" and its predecessor entered the typewriter field it was perfectly natural for the public to believe that machines made and sold by them were of appellee's manufacture and that the business of "Remington-Sholes Co." was a branch or an *extension of*, or an *amalgamation with* appellants, or was *connected, in some way, with appellee's business*. The name "Remington-Sholes" was well calculated to induce the belief that the *new* company was an *amalgamation* comprising the business of the *old* one. Manchester Brewery Co. Ld. *v.* North Cheshire & Manchester Brewery Co., Ld., 1 Ch., 536 (1899), App. Cas., 83.

Moreover it is perfectly plain that the Howe Scale Co. and the Remington-Sholes Company could not escape liabillity by instructing their salesmen, agents and dealers to inform customers of the true state of facts, *since their statements would not pass on to subsequent or ultimate purchasers, nor is there any assurance that the salesmen, agents or dealers would inform customers thereof.*

Clearly appellants' acts and statements were evidence of probability of deception.

2d. There is abundant evidence in the record besides that furnished by defendant-appellants' publications and witnesses showing confusion in the minds of the public as to the origin of the Remington-Sholes or Rem-Sho Typewriter, and the connection of that machine with complainant-appellee and its business.

(*a*) **Mr. Joseph E. Platt,** a dealer in typewriters and typewriter supplies at New Haven, Conn., was engaged in the sale of the so-called Remington-Sholes typewriter from the latter part of 1897 to the latter part of the year 1898.

R., p. 142.

During the time that Platt sold the Remington-Sholes machine he says: "*People called at my office frequently and asked if that machine was an improved Remington machine, and if it was not manufactured by Wyckoff, Seamans & Benedict, and it required considerable explanation to convince them that Wyckoff, Seamans & Benedict was not the inventors of that machine, and had not placed it on the market to take the place of the Remington typewriter.*" *He found this opinion prevalent among his patrons and the public generally.*

R., p. 144.

He stated that notwithstanding that he circulated *advertisements*, etc., in explanation of the origin of this so-called Remington-Sholes machine, *it did not seem to make any difference*, and he attributed it to the fact that people generally believed it had some *connection* with the Remington typewriter, and was in some way controlled or operated by the Remington people—Wyckoff, Seamans & Benedict. *He attributed this impression or idea in the mind of the public to the fact that the appellant and the Remington-Sholes Company used the name "Remington" prominently.*

R., pp. 145, 147.

From his observations and experience in the sale of the so-called Remington-Sholes typewriter, and the offering of it for sale, and the sale thereof, under the name Remington-Sholes or Rem-Sho typewriter, *he said that there was a decided impression created in the mind of the public that it was a Remington machine.*

R., pp. 145, 146.

The belief that it was a product of appellee was caused by the use by appellants of the name "Remington," and not by reason of witness' previous connection with appellee.

(b) **Walter M. Scheumaker** testified that in a conversation with **H. I. Seddon,** who was, in 1898, manager of the typewriter department of the appellant at 341 Broadway, New York City, that Seddon said to him that: "A man came into our store in New York only the other day, and says he, 'Is this the Remington Company?' He (Seddon): 'Yes, sir, it is,' the party, Seddon showing him a typewriter, 'Well, that doesn't look like the Remington typewriter I saw. Are you sure this is the Remington Company?' He, Seddon, replying: 'Yes, sir, this is the Remington-Sholes Typewriter Company.' 'Well, who sells the Remington Typewriter?' He (Seddon) replying: 'I don't know of any Remington Typewriter Company selling the Remington typewriter. There is a Wyckoff, Seamans & Benedict who sells the Remington Standard typewriter.'"

Granting that this witness acted in the capacity of a detective, still *Seddon was not called as a witness to contradict his testimony, and hence it must be assumed that it is a truthful statement of the transaction as narrated by Seddon to the witness.* The *prospective* purchaser, who interviewed Seddon, was undoubtedly one of the "lots of people" who called at defendant's office, No. 341 Broadway, mentioned by Parker in his testimony.

(*c*) **Mr. A. Palmer Brooks**, a salesman in the service of the complainant-appellee, dealing with business houses at the lower end of the City of New York, Borough of Manhattan, and who occasionally had interviews with persons that had purchased the so-called Remington-Sholes Typewriter, says that on several occasions he was informed by people that they had just purchased a Remington machine at a better figure than he could have given them, and on examining these machines discovered that they were not of complainant-appellee's manufacture, but were Remington-Sholes typewriters.

R., pp. 242, 245.

(*d*) In the fall of 1898, one of the Remington-Sholes machines was placed on trial with Peck Bros. Company at New Haven, Conn., at the request of Mr. Charles Henry Downs, the secretary of said company. Mr. Down states *that the name "Rem-Sho" led him to believe that it was the product of the Remington people*, coupled with the fact that Mr. Platt was, as he supposed, still selling the Remington typewriter.

R., pp. 246-248.

(*e*) **Elizabeth Wilson**, of Washington, D. C., who had been an operator upon the Remington typewriter for 10 years prior to May, 1899, and was engaged in such service in the office of the United States District Attorney, Washington, D. C., stated that a letter came to the District Attorney about October, 1898, from the Remington-Sholes Company, referring to the Remington-Sholes machine. *She said that the impression made upon her mind was that the Remington-Sholes machine was one which was being put out by the concern which had manufactured the "Remington" machine, and that the name "Sholes" or the word "Sholes," was the name of a man who had made some very important improvements, and therefore his name*

had been used in connection with the old Remington typewriter; and naturally that the Remington-Sholes was an improved Remington typewriter.

R., pp. 263–265.

The name "Remington," although linked with Sholes indicated to her mind Remington connection in typewriter production and implied the old manufacture.

(*f*) **John S. Bayes,** a salesman for appellee in the City of Chicago, testified that in canvassing that city and in offering for sale and selling typewriters he came in contact with people who made inquiry of him concerning the origin of the so-called Remington-Sholes Typewriter. He saw people who were under the belief that *this machine was either made by the complainant-appellee, or that they were interested in its manufacture.* Appellants' assertion that the inquiry ceased after the adoption of the abbreviation "Rem-Sho" is unwarranted. Witness said it was "quite general" three or four years ago, not that it had ceased to be made in 1899.

R., pp. 279, 280.

(*g*) **Albert D. Brown,** resident manager for appellee at St. Paul, Minn., and who had occupied that position since May, 1884, testified in June, 1899, as follows: "*About four months ago a gentleman by the name of Pierce, living at Rochester, Minn., called in our office in St. Paul and he had with him a card that was either sent or left with him by the 'Rem-Sho' people, and the card was printed 'Remington-Sholes.' He came in our office at St. Paul thinking that it was a branch of their office in Minneapolis, I suppose, as that was the address that was on the card, and wanted to see that machine.* We, of course, were unable to show him the 'Rem-Sho,' but did show him the 'Remington.'" This was a particular instance. He further testi-

fied, "I have had people ask me 'what about this new machine that you have recently put on the market?' and after talking with them find out that they refer to the Rem-Sho machine."

The people making the inquiry associated that machine with complainant-appellee and believed it to be its product.

R., pp. 282–285.

(*h*) **Silas W. Crandall,** the manager of the Chicago office of Wyckoff, Seamans & Benedict, testifying in June, 1899, in respect to the character of inquiries made of him concerning the origin of the so-called Remington-Sholes typewriter, and the impression in the mind of the public as to the origin of that machine said: "The inquiries were made by individuals who were interested in the subject of typewriters, who called at our store, or who interrogated me in some other place, public or private, regarding the advertisement of the company referred to, or regarding their location, their store or office, or regarding a call they had received from some agent, representative, or salesman, as to what if any, relation we had to the typewriter concern referred to in the question, *whether the machine was made at our factory or a factory with which our house had some connection*, whether the officials of our company had business connection with the typewriter company referred to in the question, *whether, as in some cases, the machine called the 'Remington-Sholes' or 'Rem-Sho' was an improved 'Remington.'* The impression in the mind of the inquirer was beyond any question whatever an impression that the machine which was the subject of inquiry possessed merit of manufacture in some degree of the same character as the Remington typewriter. There was without exception in the case of such inquiries referred to, *a confusion on the part of the inquirer as to the manufacture*, and in some instances even of the sale of the so-called Remington-Sholes or Rem-Sho as distinct from the Remington typewriter."

The witness found the impression in the mind of the public to be that the so-called Remington-Sholes, or Rem-Sho typewriter, was a product of complainant.

R., pp. 288, 290, 291, 303, 304.

With respect to specific cases the witness said that they would arise in the ordinary transaction of business, no memorandum had been made by him and no attempt had been made to recollect the names of houses. Hence he could not give the details of many of the cases.

R., 308.

In consequence of less competition with them in Chicago the cases were then, 1899, less frequent.

R., 308.

The witness only testified concerning *his own personal observation.*

It was not the adoption of abbreviated name—"Rem-Sho"—that decreased the instances of confusion in Chicago, but because the sale of the appellant's machine was then being pushed more vigorously in other territory.

(*i*) In June, 1899, **Eugene A. Conyne,** testified that he had been a salesman in the employ of Wyckoff, Seamans & Benedict, since Sept., 1892. He sold typewriters for the appellee and frequently came in contact with purchasers and users of writing machines. He said that he found on a number of occasions that prospective customers were believed that the Remington-Sholes machine was either manufactured by or in some way connected with appellee. Witness mentioned two specific cases of confusion.

R., pp. 312, 313, 314.

(*j*) **Donald McKay,** another salesman in the service of appellee, at Chicago, referred to instances where persons believed that the so-called Reming-

ton-Sholes typewriter was put upon the market by the appellee. The *confusion* was due to the *similarity of names*. He said the abbreviated name "Rem-Sho" caused misunderstanding and misconception among buyers of machines and that there was *confusion* in the public mind as to whether the "Rem-Sho" machine was the same as the "Remington."

R. pp. 316, 317, 318, 319, 320.

(*k*) **Wm. J. McNally,** city manager of appellee's Chicago office during a portion of the years 1898 and 1899, testified that: "*During the past year or 14 months that I have been in the office as city manager, there have been quite a number of instances of persons calling in at our store, mistaking our place for that of the Remington-Sholes; they have been expressmen, messenger boys and other people, who, of course I didn't know what their business was, who would ask if our company and the Remington-Sholes were not the same institution.* They would seem much *surprised* when they were informed otherwise and given directions for the office of the Remington-Sholes Company.

R., pp. 320, 321, 326.

(l) **George E. Field,** testified in 1899, that he then was and had been manager of the Indianapolis office of the appellee since Jan., 1885. He was engaged in selling the Remington typewriter and supplies, and in the repair of Remington typewriters and renting such machines. The Remington-Sholes Company and its machine had then been on the market in the city of Indianapolis for about a year and a half. He was asked whether or no he recalled any instance or instances where expressmen or people having business with the appellee had called at the Remington-Sholes Company's office by mistake, or any instance where people having business with the Remington-Sholes Company had called at appellee's office supposing

it was the Remington-Sholes office. In reply to this inquiry he testified as follows: "I don't recall any instance where a party has called at the 'Rem-Sho' office thinking that he was entering the 'Remington' office, *but we have had a number of calls at our office from people who had goods to deliver to the Rem-Sho office. Yesterday a man called with two typewriter cylinders or platens; he said he had reground them for the Remington people.* And he seemed somewhat *surprised* when I told him that he did not do the work for us, as we did that kind of work ourselves. *This week a driver from the Indianapolis Stove Company called and wanted to deliver to us a number of metal blotter baths saying that they were for the Remington people. Draymen have sometimes brought typewriters to us when they were intended for the Rem-Sho people, as well as the drivers for the express companies.*"

The witness stated that he had not ordered any of the articles mentioned. He further testified: "I have frequently been asked what *connection we had with the Rem-Sho typewriter.* Only a few days ago, a young man who was a stranger to me asked me *what this new machine of ours was*, while I was standing on the street corner waiting for a car."

The person making the inquiry referred to the so-called Rem-Sho typewriter. There was "*a great deal of confusion*, particularly in telephone calls."

R., pp. 336, 337, 340, 341, 342.

(*m*) One **A. J. Scorer,** who had been a salesman in the Pittsburg office of the defendant-appellants from December, 1897, to July, 1898, stated that when he was canvassing among users of typewriters for the purpose of selling the "so-called "Remington-Sholes" typewriter, inquiries were made of him concerning the origin of that machine and as to who were the makers thereof. Many persons making the inquiries would ask him *what connection the Remington-Sholes typewriter had with the Remington Standard machine.* He testified that *so many*

people made the inquiry of him that he could not recall all of them.

R., p. 347.

He also stated that *he attributed the fact of such inquiry being made, to the use of the name "Remington" in connection with the manufacture and sale of the so-called Remington-Sholes typewriter.*

R., p. 351.

(*n*) An article in the newspaper, published in the city of Montreal, Canada, known as **"La Presse,"** dated June 29, 1899, shows *confusion* in the mind of the writer of the article, *who appears to have believed that the machine which he saw exhibited was a "Remington" typewriter.* This fact is manifest, as he calls the machine operated by McGurrin and *explained to the business college by Franklin Remington as the "little Remington machine."*

R., pp. 378, 385, 386; R., pp. 901, 903.

(*o*) **F. Lyman Browne,** a dealer in all kinds of tpyewriters since 1881, located at 241 Broadway, New York City, testified that *he had heard the so-called Remington-Sholes typewriter called the "Remington," and by some the "improved Remington."*

R., p. 247.

(*p*) It is shown by the testimony of **Wm. A. Smith,** and by that of **John S. Bayes,** that shortly prior to Nov. 14, 1899, the W. B. Gibson Company, of Chicago, notified Wyckoff, Seamans & Benedict's Chicago office that they intended to buy a second-hand machine, and wanted to know if appellee could sell them one. Bayes answered they could not, but that appellee would be very glad to send them a new Remington machine, on two or three days' approval, which was assented to. Subsequently, and on the 17th of November, 1899, the shipping clerk made out a receipt in the city delivery book, addressed to Remington-Sholes

Company, etc., and that, together with the Remington machine, was delivered to an expressman, who first undertook to deliver the machine to the *Remington-Sholes Company*, but subsequently delivered it at complainant-appellee's Chicago office. The clerk who billed the machine says that in passing down Madison Street he had noticed the name "Remington," or "Remington Company," upon appellee's store window, and further states that his employers had quoted prices for their goods to the Remington-Sholes Company prior to this incident. *The use of the name Remington by the Remington-Sholes Company produced confusion in the minds of these persons, and hence the entry of the name of Remington-Sholes Company in the delivery and receipt book of the Wm. B. Gibson Co.*, and the attempt to deliver the machine to that company.

R., pp. 475–481.

(*q*) **Wm. A. Catlin**, resident manager of the appellee at Kansas City, Mo., testified that there was a newspaper published and circulated in Kansas City known as the "Kansas City Star." *That on October 19th, 1900, an advertisement appeared in said newspaper entitled, "Three stenographers wanted," and containing the direction to "apply Rem-Sho typewriter office, 25 E. 9th Street." That on the day following, to wit, the 20th of October, stenographers called at the complainant-appellee's office in Kansas City, 105 W. 9th Street, saying that they had called in answer to their advertisement, and wanted to know where the positions were. Others made inquiry by telephone. The witness states that there were from three to five calls at appellee's office in response to said advertisement, and two over the 'phone.* Appellee then maintained an employment department in its Kansas City office, through which stenographers were assisted in obtaining employment, and persons calling in response to said advertisement supposed that the appellee

was short of stenographic help, etc. The persons called in response to this advertisement, which was not inserted by appellee.

R., pp. 529–532.

(*r*) **J. Franklyn Hobbs** testified that prior to September 1, 1900, he was manager at Chicago of the retail department in the office of the Remington-Sholes Company. *He said that while he was city manager thereof they received numerous calls by telephone to repair Remington typewriters.* The callers usually asking: "If this was the 'Remington' typewriter, or the Remington Company."

R., pp. 550–553.

It appears that in some cases the Remington-Sholes Company in response to such calls repaired Remington typewriters.

(*s*) **Richard Daniel,** manager of the sales office of the Remington-Sholes Company at St. Louis during the year 1899, testified that in some cases parties inquired by telephone "*if that was the Remington Typewriter Company.*" In other cases the inquirer wanted to see a representative thereof about the purchase of a machine. In some cases a repair man *was wanted and in some instances repairmen of the Remington-Sholes Company were sent to repair Remington typewriters.*

R., pp. 561–562.

(*t*) **Wm. C. Goodhue,** an independent dealer in typewriters and typewriter supplies, stated that *he had inquiries made of him as to the relations between the Remington-Sholes Company and the makers of the Remington typewriter*, and as to the origin of the Remington-Sholes writing machine.

R., pp. 563–565.

(*u*) **S. W. Crandell** being asked to state any facts other than those he had testified to specifically, showing or tending to show confusion in business,

etc., testified as follows: "I recall cases where a concern being solicited by our house has *informed us that they had received a call from our representative at a recent prior date*, which fact being unknown to us caused us to make inquiries, and it developed the fact that the representative they referred to was not in our employ, *but on referring to the business card left by him was a salesman of the Remington-Sholes Company, or representing the Rem-Sho machine.* There have been cases also, of where callers at our store have interrogated us respecting *some improvement in our machine as it was understood by the customer, or at least some change which did not show on the different models we exhibit*, and then in the course of the conversation *we would learn that the customer had obtained the impression that we mere manufacturing a different model than that exhibited, and which he finally described as the 'Rem-Sho.'*"

Mr. Crandall further testified: "We have been called up by the *telephone* company, and conversation opened with us by some business house referring to some business matter, *and it would be noted by us before we had gotten very far along in the conversation that they had intended to call up the Remington-Sholes Company.* * * *

"I recall an instance of an official calling at our store representing a title and trust company, who had been talked to by some typewriter salesman, who had discussed with him the merits and demerits of the 'Rem-Sho' machine, *and he seemed to have no other idea than that he would learn more of the machine by talking with us and who, he seemed to think, were the manufacturers and dealers of the machine.*" This official called at appellee's place of business for the purpose of making inquiry concerning the so-called Rem-Sho typewriter.

R., pp. 303–304.

The evidence of the foregoing witnesses shows that there was a great deal of confusion in the

mind of the public concerning the Remington-Sholes Company and its machine, and in respect to their connection with appellee's writing machines and business. This evidence came from many independent sources, and there can be no doubt whatever as to its credibility and persuasive character.

3rd. Evidence of confusion in the mind of the public is further emphasized and shown by numerous letters and documents which have been introduced in evidence by the complainant-appellee in this case.

(1.) Hansen letters and correspondence.

The facts concerning the *Hansen* letters are proven by **Silas W. Crandall** (R., pp. 292, 294), and by the evidence of **Stephen H. Farnham** (R., pp. 281, 282).

It appears that at the time of the correspondence Hansen was proprietor of the Spencerian Business College, located at Waukegan, Ill. Hansen used two "Remington typewriters" and one "Caligraph" in his school. He purchased a typewriter of appellee some time prior to November 10, 1898, paying a portion of the purchase price of the machine in cash and gave his notes for the balance. He failed to meet his obligation in November of that year, and his attention being called to the fact, he subsequently, and on December 12, 1898, wrote a letter, stating that he had sent the remittance due in November, and addressed it to the "Remington Typewriter Company," Chicago. He received an acknowledgment of the remittance from the "Remington-Sholes Company." *Thereupon he requested the return of the money order for $10.00 which had been delivered to and received by the Remington-Sholes Company, who returned the remittance to him in their letter of December 15, 1898.*

R., pp. 292, 293.

The correspondence is reproduced, and will be found in R., pp. 941–946.

Hansen was actually indebted to appellee, and the remittance of $10.00 was intended for appellee, but was received and, for some reason not explained, retained by the Remington-Sholes Company, until he found out that it had not been received by appellee. The money order appears to have been sent on Nov. 15, 1898, and was retained by the Remington-Sholes Company until Dec. 15, a period of about one month.

As already observed, Hansen's letter was addressed to complainant-appellee as the "Remington Typewriter Company," which was and is one of appellee's trade-names, *and by which it is more generally known to the public and to owners and users of typewriters than by its true corporate name.* This correspondence shows that appellee's trade-names, "*Remington*" *and* "*Remington Typewriter Company*," *are the essential particulars with the public*, and being used by the so-called Remington-Sholes Company, the name "Sholes" was not regarded by the public as a distinction of any significance whatever.

(2.) Potter letter and envelope.

The envelope containing the letter of S. V. Potter, dated at Decorah, Ia., Oct. 15, 1898, addressed to Remington Typewriter Company, Chicago, Ill., was received by appellee after it had been opened by the "Remington-Sholes Company." Wyckoff, Seamans & Benedict received it from the letter carrier in Chicago, enclosed in an envelope bearing the printed card of the Remington-Sholes Company, of Chicago, Ill.

R., p. 295, 947.

It will be noted that this Potter letter was like many others, addressed to "The Remington T. W. Co.," and inquiry was made whether or no the appellee had any second-hand Remington machines, and if so, the price thereof. *This letter and envelope show that the writer thereof knew the appel-*

lee as the Remington Typewriter Company; that the letter was received and opened by the Remington-Sholes Co., and subsequently sent to and received by the appellee.

(3.) Dillingham letter, etc.

A letter addressed to the appellee, at its Chicago office, 146 Monroe Street, on or about Aug. 26, 1898. This letter enclosed a letter from Wallace J. Dillingham, dated Warsaw, Ind., who was principal of a business university at that place, and the letter reads as follows: "Remington Typewriter Company, Chicago, Ill. Gentlemen: *I sent you an order for a machine (rental) nearly a week ago. Why have I not heard from you?*" This letter was forwarded by the Remington-Sholes Company to the appellee, wherein they say as follows: "Enclosed please find letter, which we imagine must be intended for you, as the sender is unknown to us." *This letter, containing an order for a machine, was intended for appellee, but was received and opened by the Remington-Sholes Company.*

R., pp. 295, 297, 933, 935.

(4.) Keokuk envelope.

The appellee received from the letter carrier in Chicago an envelope containing a letter post-marked at Keokuk, Ia., Nov. 6, 1897, addressed Remington Typewriter Company, Chicago, Ill. Endorsed in copyable pencil across its face were the words: "Opened by mistake, R. S. Co." and below "Remington-Sholes Company"; printed with a rubber stamp, "F. V. Paulsen, Treasurer." Also written with a pencil, "Wyckoff, Seamans & Benedict, Madison Street." *This letter and envelope were delivered by mistake to and opened by the Remington-Sholes Company. The letter was intended for the complainant.*

R., pp. 295, 299, 939.

(5.) Appellee also received, from the letter carrier in Chicago, an envelope bearing the printed card of **Commonwealth Iron Co.**, Commonwealth, Wis., addressed to the "Remington Typewriter Agency," Chicago, Ill. Endorsed across the face of the envelope, with copyable pencil, were the words: "Opened by mistake, Remington-Sholes Company." *This letter was intended for the complainant, but was by mistake delivered to the Remington-Sholes Company.*

R., pp. 295, 8, 300.

(6.) Appellee's Exhibit Remington-Sholes Company Envelope, Oct. 21, 1898.

R., pp. 295, 296, 300.

The envelope shows that the Remington-Sholes Company recognized the fact that one of appellee's trade-names was "Remington Standard Typewriter Company."

(7.) Barnes letter.

A letter from one H. W. Barnes, addressed to the Remington Standard Company, Chicago, Ill., was received by appellee at its Chicago office shortly after the day of its date. This letter refers to the fact that the writer had previously written appellee in reference to copyholders, but that his letter had by mistake been delivered to the Remington Sholes Company. Barnes was a customer on the books of appellee at the time he wrote the letter, and Remington-Sholes Co. was then a manufacturer and a vendor of copyholders.

R., pp. 296, 301, 302, 872.

(8.) A. Rogers Lee letter.

On the 4th day of November, 1898, the appellee received a letter at its New York office purporting to have been written by one A. Rogers Lee. (R., pp. 236, 237). In said letter the writer thereof says: **"We purchased a Remington-Sholes ma-**

chine from your company, somewhat more than six months ago. This machine has not been used very much during that time and the type have worn very poorly. Will you send one of your men over for the machine and have the type put in proper condition?" * * * Lee was examined as a witness for appellee, and stated that the signature to the letter was in his genuine handwriting. He dictated the letter to the stenographer and typewriter, who wrote it before his signature was appended thereto. At the time Lee wrote the letter a Remington-Sholes machine, and not a Remington typewriter, was in use in the office of one Pelletreau, for whom he was managing clerk. *When he wrote the letter he supposed that appellee was the maker and vendor of the so-called Remington-Sholes machines, and by reason of that fact he addressed the letter to the appellee. He says he presumes that the name "Remington" and the names "Remington-Sholes" were the cause of his addressing the letter to the appellee.*

R., pp. 387, 389, 870.

(9) Noble letter.

In the latter part of September, 1899, the appellee received a letter purporting to be written by one W. K. Noble of Ft. Wayne, Ind., addressed to the "Remington Typewriter Company," Chicago, Ill., asking for their catalogue of typewriter desks, etc.

R., p. 470, 871.

(10) Springer letter and envelope.

On the 25th of August, 1899, the appellee received an envelope by post, bearing the card of the Remington-Sholes Company, containing the letter of C. R. Springer, and the letter enclosed in an envelope addressed to "Remington Typewriter Company," postmarked Aug. 24, 12 P. M., with pencil writing thereon signed Hobbs, Mgr. *This letter was opened by mistake by Mr. Hobbs, who was then city man-*

ager of the Chicago office of the Remington-Sholes Company.

R., pp. 470, 471, 932, 934.

In his letter, Mr. Springer says that *he is thinking of buying a typewriter and would like to have the appellee send a representative to him to quote prices, terms, etc.* The evidence of Messrs. Smith and Crandall shows that Springer resided in Chicago and that in September, 1899, he purchased a No. 6 Remington typewriter of the appellee.

R., pp. 467, 471.

(11.) Ginn & Co. letter and envelope.

This letter, purporting to have been written by one W. T. Field to one Kellogg, was received by appellee at its Chicago office on the 22d of August, 1899, the envelope being *endorsed in pencil, "opened by Remington-Sholes Company," and on the front of the envelope, "Try Wyckoff, Seamans & Benedict, Madison Street, City." The letter was intended for one Paul Kellogg, a salesman in the employ of appellee who was well acquainted with Field, the agent of Ginn & Co., publishers in Chicago.*

R., p. 472, 936.

(12.) Richard J. Ton postal card.

This postal card was delivered to the Remington-Sholes Company, at its Chicago office, by the postman, and afterwards mailed to appelee. The sender thereof, at the time he wrote the postal, owned a No. 5 Remington typewriter, and appears to have addressed his communication to the "Remington Typewriter Company, Dearborn St., Chicago," which was the general office, salesroom and factory of the "Remington-Sholes Company." The writer requested that a man be sent to repair his Remington machine.

R., pp. 479, 480, 488, 872, 953.

(13.) Illinois Central Railroad Company freight bill.

A freight bill of the Illinois Central Railroad Company directed to "Rem Typewriter Company 127 Rees Str." was sent by said railroad company to the appellee, whose cashier handed their shipping clerk eighty cents to pay the freight on the goods. The freight bill was directed to "Remington Company," and the shipping clerk sent an expressman with the bill and eighty cents for the goods. When the goods arrived at appellee's Chicago office, the shipping clerk noticed the packages were addressed "Rem-Sho Typewriter Company" together with the factory address of that company. He thereupon telephoned the Remington-Sholes Company that these packages were in appellee's possession subject to their order. *Subsequently the Remington-Sholes Company sent their expressman for the goods and reimbursed appellee for the amount paid thereon.*

R., pp. 481, 482, 955.

(14.) Mumaw letter and envelope.

On or about Jan. 29, 1900, one H. A. Mumaw of Elkhart, Ind., deposited in the mail, *a letter and a check enclosed in an envelope directed to Remington Typewriter Company, Chicago, Ill., which letter was intended for the Chicago office of appellee. The envelope containing the letter and a check were delivered by the postal authorities of Chicago, the office of the Remington-Sholes Company, 127 Rees Street, Chicago; the envelope was opened by an employee of the Remington-Sholes Company, and there was written in pencil across the face of the envelope the words "Opened by mistake, Remington-Sholes Company, A. L. Fairlien, Aud."* The letter, envelope and check were returned to the postal authorities by Remington-Sholes Company, and subsequently delivered at the Chicago office of appellee. It will be observed that the letter and envelope were addressed by H. A. Mumaw of the

Normal School and Business Institute at Elkhart, Ind., to Remington Typewriter Co., Chicago, Ill. *In the letter a check was enclosed for the sum of $46, payable to the order of Remington Typewriter Company.* In the letter, Mumaw refers to a student who would, subsequently, call at appellee's office in reference to a position as stenographer, etc.

R., pp. 487, 488, 542, 543, 991-994.

(15.) Mett letter and envelope.

This letter and envelope were received by the appellee at its New York office in due course of mail. Mr. H. B. Wilson, who opened the letter, testified concerning the receipt thereof.

R., pp. 492, 493.

A copy of the letter will be found in R., p. 869. It was addressed to appellee at its New York office, and purports to have been written by one Henry Mett, of Portland, Ore.; bears date Dec. 6, 1899, and reads as follows: "Gentlemen: I beg to bring to your notice that I have been appointed by Messrs. Kunst & Albers, of Wladiwostok, as their purchasing agent, with offices in Portland, Ore. *As our house exports typewriters quite extensively to Siberia, I beg to quote to me prices on regular Russian Remington-Sholes, f. o. b. Portland.* Hoping for an early reply, I am, yours truly, Henry Mett." *This letter clearly shows confusion in the mind of the writer as to the source of the manufacture of the so-called Remington-Sholes typewriter, and is evidence of the fact that he supposed that said Remington-Sholes Typewriter was manufactured and sold by appellee.* In other words that it was a Remington machine.

(16.) Metropolitan Life Insurance Company letter.

This letter was addressed to *Remington & Co.*, 11th and Chestnut streets, Philadelphia, and requested that appellee put its writing machine in

order. *It was delivered by the postman at the office of the Remington Sholes Company, and subsequently brought to Wyckoff, Seamans & Benedict's Philadelphia store, by a representative of the Remington Sholes Company, who stated that it had been received at their office, and opened by mistake.*

R., pp. 495, 496, 956.

(17.) Crescent Produce Company letter.

This letter was addressed to the Remington Typewriter Company, Kansas City, Mo., and was received at the office of appellee, in that city. The letter purports to have been sent by the Crescent Produce Company of Newton, Kansas, and requests appellee to advise the writer where their representative, who had called at the office of the Produce Company the day before, could be communicated with. The inquiry in this letter evidently referred to one Heater, who was a travelling salesman of the Remington Sholes Company. The writer undoubtedly thought that Heater was in the employ of the appellee, and was selling the Remington typewriter.

R., pp. 529, 535, 988.

(18.) Macomb Shorthand School letter and envelope.

This letter was addressed to *the Remington Typewriter Company, Chicago, Ill., and was opened by mistake by the Remington-Sholes Company.* It purports to have been written on the 6th day of November, 1900, at Macomb, Ill. The letter refers to one Lizzie Davis, who was sent to the office of appellee in Chicago, for the purpose of obtaining a situation. The letter is signed by one I. F. Meyer. Mr. Crandall testified that Miss Davis had applied to appellee for a position, and had been given an examination as to her qualifications. *The letter referred to matters that were known to appellee's employees and was intended for appellee.*

R., pp. 540, 541, 989, 990.

(19.) R. H. Edmunds Company, and Rem-Sho Booklet.

The envelope and the pamphlet therein, were received by appellee in the ordinary course of mail at its New York office on the 31st of May, 1900. On the back of the pamphlet, or Rem-Sho booklet, is written the following question or inquiry: "*Is this the same as your writer?*" *over the signature of the R. H. Edmunds Company of Columbia, S. C.,* (R. [illegible] pp. 628, 998). *The communication was addressed to Remington Typewriter Company, New York, N. Y.* It is plain that the person who made the inquiry was in doubt as to whether the so-called Rem-Sho typewriter was the same as the Remington. *It will be observed that the doubt in the mind of Edmunds, the writer, was not removed by any statements contained in the booklet,* nor by abbreviated name "Rem-Sho." The name Remington, which was printed upon the cover of the booklet, as a part of the name of the company that manufactured the Rem-Sho typewriter, evidently led the writer to believe that this machine was, or might be, the same writing machine as that manufactured by appellee or came from the same source.

(20.) Davis & Rose letter.

It appeared from the evidence of one Culpeper, that appellee was carrying on the typewriter business *in Virginia and North Carolina, under the name of the Remington Standard Typewriter Company,* the principal office being located at Richmond, Va. Culpeper was then the manager of appellee for the States of Virginia and North Carolina. He was acquainted with the firm of Davis & Rose, located at Henderson, N. C. He had been acquainted with Davis for some years prior to September, 1900, and Davis had been using a No. 2 Remington typewriter for eight or nine years prior to the time when Culpeper gave his testimony. Culpeper stated that the Remington-Sholes typewriter had then been on the market in

North Carolina for about two years and a half. *The letter addressed to the Remington Typewriter Company, Richmond, Va., purporting to have been written by the firm of Davis & Rose, was received in due course of mail on the 28th of September, 1900, at the Richmond office.* Several letters had previously been received at the Richmond office, from Davis & Rose, relating to business transactions with that firm, and Culpeper said that to the best of his knowledge and belief, they were in the same handwriting as that of "Complainant's Exhibit, Davis & Rose letter."

R., pp. 110, 113, 1000.

The body of the Davis & Rose letter reads as follows: "Gentlemen: Send catalogue for Rem-Sho typewriter. If you do not make this machine please turn this over to the proper branch, as we understand it is a part of your plant." Obviously the writer of the Davis & Rose letter believed that the Rem-Sho typewriter was either a product of appellee or that it was manufactured by a concern that was a branch or a part of appellee's plant or business.

(21.) Chester letter.

This letter was addressed to *Remington Machine Company*, 10th and Chestnut Streets, Philadelphia. It bears date March 15, 1900, and was written by one Black, President of the Chester News Publishing company, which at that time published a newspaper called the "Chester News." *The letter was received by the Remington-Sholes Company at its Philadelphia office, and after being opened by the manager, F. L. Sholes, was sent to the Philadelphia office of appellee, for whom the communication was intended. It contained a request that a man be sent to repair a machine.*

R., pp. 1201, 1202, 995, 996.

(22.) Sundry other letters.

Appellee's witness Crandall was asked whether he knew of any other instances than those specifically named by him, where letters, which were intended for appellee were delivered by mistake or inadvertance to the Remington-Sholes Company. In answer to this inquiry the witness said: "*There have been many such instances. The letters having been delivered by the letter carrier to the Remingington-Sholes Typewriter Company, have been brought to us after being opened by the Remington-Sholes Company, and we have placed the matter in the envelopes in the hands of the Post Master of Chicago, in order that the letter carriers might be called to account. The instances of where such envelopes have been placed in the hands of the Post Office, and where the envelopes were not returned to us by the Post Office, were more in number according to my best recollection than the number of envelopes referred to in the questions that have been asked me in the examination to-day.*"

R., p. 302.

Letters, communications, etc., intended for the Remington-Sholes Company, which came to and were received by the appellee at its offices.

(23.) About Nov. 25th, 1899, a communication was addressed to C. N. Fay, Dearborn Street, City, by Siegel, Cooper & Co., of Chicago. This communication came to the Chicago office of Wyckoff, Seamans & Benedict, and was forwarded by them to C. N. Fay, who then was and now is President of the so-called Remington-Sholes Company.

R., p. 951.

(24.) In December, 1899, **D. A. Leffingwell, Jr. & Co.**, of Ashland, Ky., addressed an envelope to the Remington Typewriter Company, Chicago, Ill., enclosing a letter addressed to "Remington-Sholes Typewriter Company, Chicago, Ill." They stated

that they intended purchasing a second-hand typewriter, and desired to know at once *if said company had a late model of a Remington on hand*, and at what price, etc. This communication was received by appellee, in due course of mail, and after the envelope was opened and it was seen that the letter was intended for the "Remington-Sholes Company," it was forwarded to said Company. Inasmuch as a large portion of the mail of appellee was addressed to the "Remington Typewriter Company" which was appellee's trade-name, the letter-carrier delivered the letter to the appellee.

R., pp. 949, 950.

(25.) In or about the month of July, 1899, **a letter was received at the Chicago office of appellee addressed to Franklin Remington, care of Remington Typewriter Company.** The letter was opened by mistake, and the error being discovered, it was immediately forwarded to the Remington-Sholes Company.

R., pp. 460, 868, 931, 948.

(26.) In January, 1900, a letter was delivered by the mail carrier in the regular course of mail, at the office of appellee, written by a person at the Hotel Scott, Caldwell, Ohio. **The letter was addressed to Mr. Charles Norman Fay, Mgr. Remington Typewriter Company, Chicago, Illinois.** *The envelope containing the letter was returned to the mail carrier on the same day and was delivered in the regular course of mail to Charles Norman Fay, president of the Remington-Sholes Company at the office of that company in Chicago.*

R , pp. 556, 981.

(27.) Mr. John F. Soby, manager of the Philadelphia office of appellee, stated that in October, 1899, **there was a small package delivered at the office of Wyckoff, Seamans & Benedict, addressed to the Remington-Sholes Company,**

the imprint on the label indicating that it had been sent from their London office. Directly the package was received by appellee, it was sent by Mr. Soby to the Remington-Sholes Company's office in Philadelphia.

R., p. 496.

The foregoing letters, etc., relate to sundry matters and transactions. One of them contained a money order, and another a check, which were intended for appellee, but received by Remington-Sholes Co. Some of these letters contained inquiries in respect to the price of Remington machines; others related to rental of machines and the repair thereof, while still others related to various inquiries such as situations for typewriter operators, that catalogues be sent, and whether or no the Rem-Sho machine was the same as the Remington, etc. In some instances letters, packages and freight bills, which were intended for Remington-Sholes Co, were delivered to appellee. Most of the communications, however, were intended for the appellee, and were addressed to it as the "Remington Typewriter Company," but were received by Remington-Sholes Co.

It is to be noted that "Complainant's Exhibit Rem-Sho Indianapolis Envelope" was introduced in evidence to show that it was common for appellee to receive letters, etc., at its Indianapolis office addressed to the "Remington Typewriter Company," and as further tending to show that confusion in business was likely to arise by Remington-Sholes Co.'s use of the name "Remington" in connection with its business and machines.

All of the letters relating to the Hansen matter (R., pp. 941–946) were put in evidence so that the whole transaction might appear of record.

The letters above referred to were such as came to hand about the time the bill of complaint herein was filed and during the time that complainant's testimony was being taken; that is in the years 1898, 1899 and 1900.

Counsel for appellants asserted, in the court below, that the record herein shows that only twelve letters intended for appellee had been delivered to the *Chicago* office of Remington-Sholes Co.; but in this connection it is to be borne in mind that appellee's witness Crandall, who produced many of these letters, was interrogated and testified as follows: "54 Q. Do you know of any other instances where a letter which was intended for Wyckoff, Seamans & Benedict was delivered by mistake or inadvertence to the Remington-Sholes Company. I mean other than those which have been produced and put in evidence after having been identified by you? A. There have been *many* such instances. The letters having been delivered by the letter carrier to the Remington-Sholes Typewriter Company have been brought to us, after having been opened by the Remington-Sholes Company, and we have placed the matter in the envelopes in the hands of the Postmaster of Chicago in order that the letter carriers might be called to account. The *instances* of where such envelopes have been placed in the hands of the Post Office, and where the envelopes were not returned to us by the Post Office, *were more in number*, according to my best recollection, than the number of envelopes referred to in the questions that have been asked me in the examination today."

It is, therefore, plain that the record does not show *many instances of confusion* in the mails at Chicago, which came to the personal attention of Mr. Crandall, the manager there of appellee's office. Another fact to be borne in mind is that notwithstanding this matter was many times brought to the attention of the Postmaster and his employees at Chicago, nevertheless *the confusion continued*, and letters which were intended for appellee were delivered to the Remington-Sholes Company, due beyond question to its use of the name "Remington" in its business.

The "Mett Letter," the "Edmonds-Rem-Sho

Booklet," and the "Davis & Rose Letter," show confusion in the minds of the writers thereof in respect of Remington-Sholes Co.'s business and machine. *Manifestly "Rem-Sho" did not differentiate the two concerns or their products.*

Counsel argued below that the mistakes of the letter carriers were of no consequence in this case and cited Sterling Remedy Co *v.* Eureka C. Mfg. Co., 80 Fed. Rep., 105; Dadirrian *v.* Yacubian, *et al.*, 98 Fed. Rep., 872; Goodyear *v.* Goodyear Rubber Co., 128 U. S., 598, as authorities holding that mistakes of letter carriers cannot prove confusion in the public mind as regards the identity of or connection between the appellee and appellant's principal. It is respectfully submitted that neither of the cases cited supports the broad proposition enunciated by counsel. Every case must of course be considered and read in the light of it own particular facts and circumstances.

In the first of the above cited cases, it was held that "Baco-Curo" did not infringe "No-To-Bac," and that there was no similarity in the labels which was calculated to mislead the public. The Court observed that: "There would seem to have been a *few* instances of confusion, such as the sending of letters by druggists intended for one party to the other. Such mistakes occur in every business and are not *sufficient to indicate that there was here intentional or actual piracy* upon the rights of the complainant."

All the Court meant to say in that case was that *in the absence of any other evidence*, a "*few* instances of confusion"—how many does not appear—were insufficient to establish *intentional piracy* on the part of the defendant Just what the character of the mistakes was in that case does not appear. All that can be said is that *in that case* the mistakes were not of a character to convince the Court of *intentional or actual piracy* upon the rights of the complainant.

In respect to the Dadirrian case, *supra*, it is not apparant that it has any *relevancy* to the point to which it was cited.

In the Goodyear case the Court referred to the allegations of the bill, and among others to the averment that by reason of the use of the name "Goodyear Rubber Co."—*which it held was purely descriptive*—much loss and inconvenience to complainant's business was caused, in that telegrams and letters addressed to it had been diverted. That appears to be the *only* reference to the matter under discussion, contained in the opinion of the Court. The Court placed its decision upon the ground that the name of "Goodyear Rubber Co." being a name descriptive of well-known classes of goods, produced by the process known as "Goodyear's invention," was not one capable of exclusive appropriation.

In the Higgins Case, *supra* (144 N. Y., 466), the Court referred to the fact that it was shown on trial that letters intended for the plaintiff containing orders for goods, or relating to other business matters had been sent to the "Higgins Soap Co." "Charles S. Higgins Soap Co.," and "Chas. Higgins Co.," but in general the plaintiff's place of business was added to the address and they were received by the plaintiff. And then adds: "There were produced twenty-eight letters and envelopes of this kind, written within four months after the organization of the defendant and the commencement of the action, and it was stated that these did not comprise all the letters of this description." It is therefore clear that these letters were regarded as of force in the "Higgins" case, and as tending to show that the use of the name "Higgins" was calculated to produce confusion, etc. In the same case at p. 471, the Court also said: "The evidence shows that confusion has arisen, and it is a reasonable presumption that if the defendant is permitted to continue to carry on the business of soap making under its present name the public will be mislead

and the plaintiff's trade diverted, the extent of such diversion increasing with the increase of the defendant's business."

4th. There was much confusion in telephone service in consequence of the use of the name Remington by appellants.

R., pp. 303, 307, 311, 340, 552, 561, 562.

5th. Acts, statements and representations of the agents of Howe Scale Company and Remington-Sholes Company—and their agents and dealers, showing an intent to pirate the good will of appellee's business, and to sell the Remington-Sholes writing machine as and for a Remington machine, or a species thereof, or as a new or an improved Remington machine.

(a) Thomas F. Crean on behalf of complainant visited certain places for the purpose of ascertaining what representations the appellants and their agents and dealers were making in respect to the Remington-Sholes machine in the sale thereof. He visited Montreal, Canada, in August, 1898, and called at the office of Clement and Clement, who were agents for and dealers in the so-called Remington-Sholes typewriter. *He saw printed catalogues of that machine displayed on a table in their salesroom, and saw a Remington-Sholes machine in their office.* He was informed that it was the office of the *Remington typewriter* in Montreal; that the Remington-Sholes machine was made by the inventors and former manufacturers of the old Remington machine, *and that it was a new improved Remington machine.* He was further informed by Mr. Clement that Sholes had made some recent improvements on the old Remington, and that these recent improvements had been embodied or combined with the good features of the old machine, etc.

On the entrance door of the office there was painted on the glass the words "Remington Sholes Typewriter."

R., pp. 106, 107.

Alexander Clement admits that in 1898 the firm of Clement and Clement carried on the business of selling typewriting machines at Montreal and so continued until August, 1899. They began selling the Remington-Sholes machine in 1896 and gave it up at the end of 1899. They acted as dealers.

R., pp. 1305–1306.

The firm of Clement and Clement had *the name "Remington-Sholes," not "Rem-Sho," on the entrance door, painted on the glass, and on the window, in letters about five inches high, "Remington-Sholes Typewriter."*

R., p. 1307.

While Clement denied some of the statements attributed to him he admitted that he had *no recollection* whatever of an interview with Crean at his office in August, 1898, or at any other date.

R., p. 1308.

Clement, like all the other dealers and agents engaged in offering for sale and selling the "Remington-Sholes Typewriter" *appears to have regarded the use of the name Remington-Sholes as one that was calculated to mislead and produce confusion in the mind of the public*, for he says, "There was a strict rule in the office to always make it very plain to inquirers, or intending purchasers, that the Remington-Sholes Typewriter was not the Remington Standard Typewriter."

And again he says, "I gave instructions to the effect that under no circumstances whatever should any one be left under the impression that the Remington-Sholes typewriter had any connection whatever with the Remington Standard Typewriter." *This evidence is illuminative, for it shows that the Remington-Sholes Company and its dealers knew that they were using a name of doubtful propriety and one naturally calculated to produce confusion and deception*, and hence the above instructions to

agents and employees. The company, therefore, had to rely upon the honesty and truthfulness of its agents and employees to prevent deception of the ultimate purchaser.

R., pp. 1308, 1309.

Appellee's good will was, indeed, rendered precarious, if it must rely upon appellants' agents and dealers for protection.

Clement admits that he sometimes stated that the son of Mr. Sholes, who had something to do with the invention of the Remington typewriter, *and the son of Mr. Remington who manufactured the first Remington machine were the inventors of the Remington-Sholes Typewriter.*

R., p. 1310.

These statements, were to say the least, *grossly inaccurate.* It is obvious that Clement, like all the agents and dealers selling the Remington-Sholes machine, was trading largely upon the *reputation of the name "Remington,"* which for many years had been associated with appellee's product and business, and had been made of great value in the typewriter trade by appellee and its predecessors.

(b) Crean visited the office of the Tribune Cycle Company on or about October 4th, 1898. *The Cycle Company was then the representative of the Howe Scale Company for the sale of the Remington-Sholes typewriter in Baltimore, Md.*

Roger E. Lewis, of Baltimore, accompanied Crean and was present at the interview with one J. T. Gillelan, then in charge of the typewriter department of the business. Remington-Sholes machines and catalogues were on exhibition in the store of the Cycle Company. *Gillelan stated to Crean in the presence of Lewis that "he had an improved Remington, and he would be glad to have us look it over."* While examining the Remington-Sholes machine, *Crean asked Gillelan the direct question,*

"*Is this a Remington machine?*" *to which he replied,* "*Yes, it is the new Remington; it is manufactured by the former manufacturers of the old Remington, and was invented by the inventors of the old Remington.*" Gillelan also said that the so-called "Rem-Sho machine" was "*an improved Remington,*" and that it was "*the new Remington, and is a decided improvement over the old Remington.*"

Gillelan further said to Crean that Mr. Remington and Mr. Sholes, whose names were applied to the machine, which he was offering for sale, *formerly made the old Remington*, which they sold some time previously to people called Wyckoff, Seamans & Benedict, and that the only typewriting machine which the Remington people were then manufacturing was the Remington-Sholes typewriter.

R., pp. 108, 109.

The evidence of Crean is corroborated by the testimony of Lewis, who was present at the interview and made *a memorandum* of the conversation shortly after it occurred.

R., pp. 249, 251, 873, 874.

Gillelan's statements were, substantially, the same as those made by other agents and dealers, the purpose being to appropriate the good will and reputation of appellee's business and machine.

Gillelan, as a witness, denied that he made some of the statements attributed to him by Crean and Lewis, but it is perfectly obvious that *his evidence is almost entirley a matter of opinion and not of recollection.* He remembered little, if any, of the conversation that took place between Crean and himself at the interview in the store of the Tribune Cycle Company in Baltimore. In short, Gillelan was a "*nonmi ricordo*" witness.

(c) Crean visited Washington on the 20th of September, 1899. He called at the office of the Remington-Sholes Company, which was then in

charge of one Frank L. Sholes. Sholes showed him a "Remington-Sholes" machine, and stated to him that his uncle, who was the original inventor and had been the manufacturer of the Remington machine, had combined with the Remington people, and that together they were making the "Remington-Sholes" typewriter. Sholes stated that, inasmuch as *the old Remington was no longer made by the Remington people, but by a firm called Wyckoff, Seamans & Benedict, that his machine was now the only Remington machine on the market.*

R., pp. 111, 112.

Sholes was called as a witness, and from his testimony it appeared that *during the month of August, and the major part of September of the year 1898, he was the agent and an employee of the Remington-Sholes Company and had charge of its office in the City of Washington.*

R., pp. 1161, 1162.

Sholes remembered having a conversation with a gentleman representing himself as Francis, whom he supposed to have been Crean, but denied that he made all the statements attributed to him by Crean in his testimony.

Sholes, however, says: "I did tell him that the Rem-Sho machine was the only typewriter on the market now made by a Remington," meaning F. Remington of the Remington-Sholes Company.

R., p. 1167.

Sholes testified that he had been with the Remington-Sholes Company almost from its inception, and that while he had no written instructions *he was always told not to confound the name Remington-Sholes with that of the Remington Standard. Implying,* in his case as in that of other agents and representatives of the Remington-Sholes, that *the pros-*

pective purchaser was likely to be confused or misled by the name used by the Remington-Sholes Company.

R., pp. 1169, 1170.

Sholes was cross-examined as to whether or no he had seen the statement that the Remington-Sholes was the only machine made by a Remington, in catalogues or other publications circulated by the appellant and the Remington-Sholes Company.

He testified as follows:

xQ. 191. Have you seen the statement, so far as you appear to remember, in *catalogues* circulated by you and by others in behalf of the Remington-Sholes Company? A. *I have seen the statement, "this is the only machine now made by a Remington," in catalogues which have been circulated by me.*

xQ 192. Have you also seen that statement *in any advertisements in newspapers or any publications* in which the same statement was made? I mean publications advertising the Remington-Sholes typewriter and purporting to be issued by the Remington-Sholes Company? A. *I believe I saw it once;* I cannot remember what publication it was in, or when.

xQ. 193. *I presume that during the course of your employment by the Remington-Sholes Company you made that statement more or less frequently to persons who were looking at the Remington-Sholes machine or examining it with a view to purchase; is such the fact?* A. *I have.*

xQ. 194. And have you ever made the statement to purchasers or intending purchasers in substance or in effect that it was the *second generation* of typewriter builders by the name Remington? A. No, sir; I have not; *I have called it second generation typewriter.*

xQ. 195. You say in your testimony that you did tell the so-called Mr. Francis (Crean) that *the Rem-Sho machine was the only typewriter on the market now made by a Remington; is that so?* A. *I did.*

xQ. 196. Then you regarded it, I suppose, *as a Remington make of machine;* is that so? A. *I regarded it as being made by F. Remington.*

xQ. 197. Well, that would make it a Remington make, would it not? A. Only so far as F. Remington is connected with the Remington-Sholes Company.

xQ. 198. You have said you regarded it as being made by F. Remington. *Now did you regard it as a Remington make of machine?* A. I said that the statement "the only machine now made by a Remington" referred to F. Remington of the Remington-Sholes Company, I regarded it as being made by a Remington.

xQ. 199. *Well, did you regard it as an F. Remington make of machine?* A. *No, sir, I did not.*

xQ. 200. *Why not?* A. *Because it was made by the Remington-Sholes Company of Chicago.*

xQ. 201. *Why then did you say that it was the only machine now manufactured by a Remington?* A. *I took the statement from the Rem-Sho catalogue.*

xQ. 202. But nevertheless you mean to say now, as you said in a previous answer, *that you regarded it as being made by a Remington; is not that so?* A. *It is.*

xQ. 203. And I ask you again whether you did not also regard it as a Remington make? A. I regarded it as being made by a Remington. I presume that would make it a Remington make.

R., 1197-1199.

The above quoted excerpts, from the testimony of the witness Sholes, show that the Howe Scale Co. and the Remington-Sholes Company and their agents and dealers represented to *prospective* purchasers *that the so-called Remington-Sholes or Rem-Sho typewriter, was the only machine made by a Remington and they meant thereby that it was a Remington make or in other words a "Remington" machine.* It is true that the witness says, in *one*

answer, that he regarded the machine as being made by Franklin Remington, and hence that it was being made by a Remington. *But when he was asked whether or no he regarded the machine as a Franklin Remington make of machine, he said he did not, because it was made by the Remington-Sholes Company of Chicago.* It stands out clearly in the proofs, in this case, that the machines manufactured by the Remington-Sholes Company and sold by the defendants and their agents were made by the Remington-Sholes Company, a *corporation, and not by Franklin Remington;* that is to say, by an *artificial* person, an entirely distinct entity from Franklin Remington, one of its incorporators and employees. The statement that the Remington-Sholes machine was made by a Remington was manifestly untrue, and showed an *intent* on the part of the appellant and its principal, and their agents and dealers, *to pervert the facts* and avail of the reputation associated with that name. **This is further proven by the fact that they nowhere asserted that their machine was the only one made by a Sholes or by a Fay.** They knew that the names "Sholes" and "Fay" had no repute in the market, or among purchasers or users of typewriters, but that the name "Remington" was a potent one, or as the Remington-Sholes Company had styled it in one of its advertisements **"this great name."** It will hereafter appear that the *purpose* of this statement and representation, and others of similar import, was *to artfully instill into the mind of the public the idea that the Remington-Sholes machine was the only genuine Remington typewriter*, and that the machine manufactured and sold by appellee was not a *genuine* "Remington" machine.

This fact is emphasized and made clear in an affidavit or statement of **Franklin Remington**, which was published in a Russian newspaper at Moscow in November, 1899, and which is admitted to be a correct version of Remington's affidavit, except in one particular (R., pp. 661, 983). In another

advertisement of this man, Hagan, whom *Franklin Remington declared was the only authorized agent for the sale of the Remington Sholes machine in the whole of Russia*, said machines were referred to as "*These genuine 'Remingtons' made by Remington-Sholes.*"

R., p. 986.

From the foregoing reference to Sholes' testimony, it is perfectly clear that he represented to Crean, as he did to others, *that the Remington Sholes typewriter was the only genuine Remington machine, or Remington make of machine, on the market, and also that he was trading upon the repute of the name Remington.*

Crean was corroborated by Miss Danaher.

R., pp. 257, 258.

(d). On the 19th of July, 1898, Crean visited Philadelphia, and at the Hotel Lafayette in that city had an interview with one **Wm. J. Romig,** who was then a salesman, in the employ of the appellant company, at its Philadelphia office. Romig came to the hotel in response to a telephonic message sent, by Mr. Crean, to the office of the Howe Scale Company. Romig stated to Crean, in substance, that the *Remington-Sholes* typewriter, which he was offering for sale, was *an improved Remington machine; that it was made by the former manufacturers of the old Remington, and was being handled through the Howe Scale Company by the Remington Sholes Company whose office was in Chicago.* Romig stated that the *Remington* machine was at present not manufactured by the Remington Company, but by Wyckoff, Seamans & Benedict, *and that his was really the Remington machine.* Crean suggested to him that there might be an opportunity for doing some business in Jamaica in the West Indies, and that the only machine known there was the Remington typewriter. Romig said that would certainly help his being able to do some business, *as his was the only machine outside of the old Remington which could be offered or*

sold as a Remington machine. He told Crean that the former Remington agents in Holland, South Africa and Australia had given up handling the old Remington in order to handle the *improved Remington;* that an order, placed by the Department of Justice at Washington for thirty machines, had been awarded to the Howe Scale Company for Remington-Sholes typewriters.

At the suggestion of Crean, Romig left the hotel to obtain a letter covering the details referred to in the conversation and returned in about an hour with **"Complainant's Exhibit Seddon-Romig letter, July 19, 1898."** (R. pp. 971, 972.) This letter covered certain portions of the conversation, *but omitted other parts thereof.* It was written on a typewriter by Romig, *and signed Remington Sholes Company, H. I. Seddon, Manager. The letter head bears the name of appellants.* On receipt of the letter, Crean suggested to Romig that one fact, which he had stated in their conversation, was not covered by the letter, to wit, that the Remington machine was not then being made by the Remington Company, *and that the Remington-Sholes was really the Remington machine.* Thereupon Romig said that he had intentionally omitted any reference to that point, for the reason that his company did not care to put a statement of that kind in writing. He said, however, *that the statement was entirely true and that they did not hesitate to make similar statements whenever the question was asked.* That if Crean insisted on it, he had no particular objection to making the statement in writing, and took the letter and wrote at the bottom of the second page thereof as follows: **"P. S. It might prove of interest to you to know that the Remington machine at present is not manufactured by the Remington Company, but by Messrs. Wyckoff, Seamans and Benedict, so that this is really the Remington machine."**

R., pp. 112–116.

Romig was called as a witness on behalf of the defendant-appellants, and his testimony will be found in R., pp. 1113–1144.

He testified that from February, 1898, to August 1, of the same year, he was in the employ of the Howe Scale Company, 508 Market street, Philadelphia. His employment was that of a stenographer and salesman, and he was engaged in selling the Remington-Sholes typewriter for the appellant, who was at that time acting as general sales agent therefor.

R., pp. 1113, 1114.

He further testified at considerable length concerning his interview with Crean at the Hotel Lafayette, in Philadelphia.

R., pp. 1115, 1116.

Whilst Romig denies that he made certain statements, attributed to him by Crean, *his lapses of recollection and want of memory*, in regard to certain matters, were so pronounced, that little, if any, reliance can be placed on his denials. *He claimed to have entirely forgotten that he had ever written or delivered, to Crean, the letter of July 19, 1898, "Complainant's Exhibit, Seddon-Romig letter."*

For example at pp. 1120, 1121 of Record, Romig's attention was called by appellant's counsel to this exhibit letter, and particularly to the *postscript* thereto, and he was asked whether or not he wrote such *postscript*, and, if so, to state fully the circumstances under which it was written. His reply to the question was: "I do not recall having given him a letter, so that I could not say anything about the postscript." *The Scale Co. has, however, admitted it to be a fact that the postscript was written by Romig.*

R., p. 926.

In cross-examination, at R., pp. 1129, 1130, Romig was unable to assign any reason for his failure or lapse of memory in respect to this letter or the contents thereof. Like Gillelan, Romig was

pre-eminently a "*non mi ricordo*" witness, insofar as "Complainant's Exhibit, Seddon-Romig letter" is concerned.

R., pp. 1134-1135.

Romig says that "It might also be possible, that I said to him (Crean), that *the Rem-Sho machine was the only one manufactured by a Remington*, meaning, of course, Mr. Frank Remington."

R., p. 1135.

In this connection it is to be noted that the *genuineness* of the letter, to wit, "Complainant's Exhibit, Seddon-Romig letter, is *undisputed*. Mr. H. I. Seddon signed the letter, *and if it were not genuine, he would have been called to testify to that fact.* Some of the statements testified to by Crean, as having been made by Romig, are embodied in this letter, as for example Romig's assertion that the former Remington agent in Holland had left the appellee, and had come into the Remington-Sholes camp; that the Remington agent in South Africa had ordered a quanity of their machines, and that they had recently been awarded the contract from the United States Government for Remington-Sholes typewriters, etc. As said above, *this exhibit letter bears the name of the Howe Scale Company, and Romig stated in cross-examination that at the time of his interview with Crean he represented that company.*

R., pp. 1123, 1124, 1125.

Undoubtedly Crean concealed from Romig his true name, etc., and that he was in respect of this matter acting in the capacity of a detective to find out just how appellants and their agents were representing the "Rem-Sho" machine in the sale thereof. But it is absurd to assert that Romig was *entrapped* into saying and doing that which it appears he and other agents had admittedly said and done before, with the knowledge and approval of their principals. Counsel's superlative criticism

of Crean is not of force as Crean's testimony in respect to his transactions with appellants office at Philadelphia, is fully corroborated by documentary and oral testimony. *The facts are beyond debate.*

(e) Shortly after the interview with Romig, and on the 16th of September, 1898, Crean visited *Camden*, N. J., and there met and had an interview with one **Walter M. Wilgus,** a salesman in the Philadelphia office of the Howe Scale Company.

R., pp. 114, 1337.

Crean testified that he showed Wilgus the letter, which Romig had previously given him, and that after Wilgus read it he stated that he knew of such a letter having been written, and that it was alright, *and that he would be glad to carry out the terms of the letter and sell him a machine.*

Wilgus spent some time with Crean talking over, in a general way, the Remington-Sholes typewriter. Crean says that in conversation Wilgus repeated, practically *the same statements that Romig had made in respect to the "Rem-Sho" being, really, the Remington machine, and as to its having been manufactured and invented by the former manufacturers and inventors of the Remington typewriter.* Before the termination of the interview, Crean asked Wilgus to give him some printed matter relating to the Remington-Sholes machine. Crean asked him if he did not have something in the way of *printed* matter covering the *mechanical* features of his machine, that is covering such points as a *salesman* should be posted about in talking the machine to *prospective* customers. Wilgus replied that *he had his private letter of instructions*, which he did not object to showing Crean, although it was intended only for the use of their salesmen. He thereupon handed Crean a typewritten paper covering nine pages, and turning to the 9th page he called Crean's attention particularly to the following paragraph: "Escapement

of our machine is nothing more than the escapement of the old Remington machine," and **"The machine has now been fully explained and it remains with the salesman to add such other interesting facts, such as the history of the company, the connection of our Mr. Remington with this machine and the relation to the old Remington Standard, the fact that this is a second generation of typewriter builders, and that the same standard of excellence is being maintained in the manufacture of this machine as all other goods which have been produced by the Remingtons."**

These instructions to salesmen were *admitted* by Howe Scale Co. and the Remington Sholes Company, to have been circulated among their *agents and dealers* for the purpose of giving *instructions* to them in regard to the "Remington-Sholes" typewriter.

R., pp. 1005, 1142, 1143.

Wilgus admitted that "Complainant's Exhibit Instructions to agents by the Howe Scale Company," headed **"Facts to bear in Mind,"** looked like those given to Crean by him at the time of the conversation in Camden. *He said it was matter for the instruction to salesmen; and that he received it from Mr. Seddon, manager of the typewriter department in the Howe Scale Company's office at Philadelphia.* He also testified that *he followed the instructions and used them* whenever the question was asked in regard to the *name* of the company.

R., pp. 1346, 1347, 1072, 1073.

In these "Facts to bear in Mind," the *salesman* is instructed to "make a point to see some *prospective customer* every day. Bear in mind the value of friendship and 'pull.' * * * *In other words leave no stone unturned.*" With these "General points in mind," it is clearly manifest that the *salesman, in his zeal to sell* the so-called Remington-Sholes machine, would not be at all

modest in his statements in respect to "*the connection of our Mr. Remington with this machine and the relation to the old Remington Standard.*" As already shown, "our Mr. Remington" *was never in the typewriter business, and possessed no skill therein before he bestowed his name on the Remington-Sholes Typewriter Co., and had no relation to the old Remington Standard,* except that his father was once a stockholder and an officer of E. Remington & Sons, *which connection ceased in 1882.* The above quotation, if it has any meaning at all, implies that the Remington-Sholes Company, so-called, was the *successor* in business of the old concern, E. Remington & Sons, *and was then carrying on such business, and as successor, and the same standard of excellence was being maintained in the manufacture of the Remington-Sholes machine, as of all other goods which had been produced by the Remingtons.* Such statements as those lodged in the minds of *salesmen*, who were told to "*leave no stone unturned*," were well calculated to bear fruit, and to cause them to make statements calculated to injure the *good-will* of appellee's business, and to cause the public to believe that the machine manufactured by Remington-Sholes Co. was "a *Remington*" typewriter, or an *improved* Remington machine. There certainly was no basis for the representation that Franklin Remington ever had any *connection* with "the old Remington Standard typewriter," or that the Remington-Sholes Company was the "*second generation* of typewriter builders," *or that it was maintaining the same standard of excellence in the construction of the Remington-Sholes typewriter as had been maintained by the Remingtons, that is E. Remington & Sons,* when they manufactured the "Remington" typewriter. The "standard of excellence" was and is maintained by appellee. *The above quoted excerpt furnishes clear proof of an intent on the part of the appellants to surreptitiously obtain the benefit of the great reputation which had long been associated with the writing machine and business of which appellee was and is the sole successor.*

At the time Crean visited *Camden*, he purchased a Remington-Sholes machine of Wilgus for the sum of $62.50, and an invoice of the machine was sent from the Howe Scale Company and delivered to him. This invoice will be found (R., p. 884). *It was receipted, Howe Scale Co. by Wilgus.* The name *Remington* in this invoice appears in quotation marks, and the machine is said to be of "**the style Remington.**" After the transaction was completed, Crean brought the machine to New York City, and it was, subsequently, delivered to appellee, and is now an exhibit in this case.

R., pp. 116, 117.

Another invoice is in evidence in this case bearing date July 29, 1898 (R., p. 833), which Crean testified he received in New York on the 30th day of July, 1898, and that it was in the same condition when introduced in evidence as when received, with the exception of the pencil memorandum thereon.

R., pp. 136, 137.

It will be noted that *this invoice refers to the Remington-Sholes Typewriter as "of the style Remington."*

These invoices also furnish evidence showing that appellants were offering the Remington Sholes typewriter *as a Remington machine, or a species thereof.*

As above said, in obtaining this testimony on behalf of the appellee, Crean was, undoubtedly, acting as a detective, but that does not displace his evidence, when, as in this case, his testimony is, *to a large extent, corroborated* by the evidence of other witnesses, by admissions of appellants and by documentary evidence, which has not been disputed by the appellant. In **Lever Bros., Ld.**, *v.* **Pasfield,** 88 Fed. Rep., 484, the Court held that proof of a single sale, though made to *complainant's detective*, might, in connection with other proofs, be sufficient to justify an injunction.

To the same effect DeFlorez *v.* Reynolds, 14 Blatch., 505; Fed. Cas., No. 3742. Saw v. Hart 90 NY. 457

In the case at bar there are other proofs besides the evidence of Crean, and corroborative thereof. The cases cited in the Court below in respect of the unreliability of detectives' testimony are not of force here, because the facts and circumstance were different, and there was no *corroborative* proof in those cases.

In this connection it is to be noted that it is not pretended or claimed that *Crean* was misled, but it is contended that the evidence obtained by him shows an *intent* on the part of appellants, their agents and dealers, to pirate the good-will of appellee's business and to sell their machines as and for *Remington* typewriters. Also that such statements, when made by agents and dealers to prospective purchasers, were likely to mislead and deceive them.

(f). Appellants' witness, **Baldwin,** *admitted that he had seen in the Remington-Sholes Company's catalogues the statement that the Remington-Sholes typewriter was "the only machine manufactured today by a Remington."*

R., pp. 1037, 1038.

He says he made that statement, *in instructing dealers and agents in their duties, because he saw it in the catalogues and supposed he was at liberty to talk what was printed.*

R., p. 1038.

Baldwin testified concerning inquiries being made of him by *prospective* purchasers, dealers and agents, as to what *connection* the Remington-Sholes Company had with the Remington typewriter; and among other things he was interrogated and answered as follows:

xQ. 189. And in that connection did you sometimes tell these people that the Remington-Sholes typewriter, or Rem-Sho typewriter was "the only

typewriter made by a Remington?" A. No, sir; I never told anyone anything of that kind. *I have told them, as stated before, that the Rem-Sho typewriter was the only machine now made by a Remington.*

xQ. 199. What was your object in telling prospective buyers or dealers or agents that? A. My object then and now and always has been to get business, the same as any other salesman.

R., p. 1043.

It already appears from the evidence of appellant's witness, Sholes, *that this representation in the catalogue, etc., meant a Remington make of machine,* and we here have the *admission* of appellant's witness and general organizer *that his object in making this statement was and always has been "to get business."* In other words, by representing it as a *Remington make,* the appellants were enabled "*to get business,*" *and make sales to purchasers of the Remington-Sholes machine, which it otherwise would not have made, and was thereby enabled to displace appellee's machines.*

R., p. 1043.

(g). Appellants' witness, **Hatch,** admitted that he had seen the statement that it was "*the only machine now made by a Remington,*" in the *catalogues* of the Remington-Sholes Company.

R., pp. 1050, 1069.

(h). **J. Franklyn Hobbs** stated that *he had distributed catalogues of the Remington-Sholes Company* containing the statement that the Remington-Sholes machine was "the only machine now made by a Remington."

R., pp. 1098, 1099.

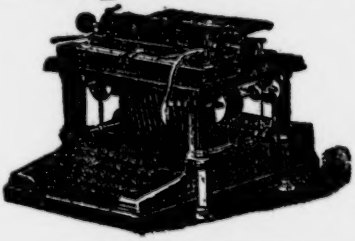
APPELLANTS' CATALOGUE.

In "Complainant's Exhibit Rem Sho Booklet," *on the back side of the title page and opposite to a cut of the "Remington-Sholes Company Factory" appear the words, "the only machine now made by a Remington."* These words are arranged about the center of the page, no other printed matter appearing thereon. It is intended that the *prospective* purchaser shall see those words directly he opens the catalogue. The same words are found in the same location in "Complainant's Exhibit Remington - Sholes - McGurrin catalogue."

SCIENTIFIC AMERICAN.

In this connection, "Complainant's Exhibit Rem-Sho advertisement in Export Edition of the Scientific American" is both pertinent and illuminative. We here re-produce said exhibit.

Máquina de Escribir Rem-Sho.



Fabricado y de Venta por

THE REMINGTON-SHOLES CO.

CHICAGO, ILL., U. S. A.

La única máquina de escribir fabricada hoy por uno de la familia **REMINGTON.** Es fuerte y exacta, y digna de confianza, representando la segunda generación de fabricantes de máquinas de escribir que llevan este nombre célebre.

Queremos agentes por todo el mundo.

Pídanse cátalogos ilustrados.

REM-SHO TYPEWRITER.

The only typewriter manufactured to-day by a **REMINGTON.** Strong, reliable, and accurate, it represents the **SECOND GENERATION** of typewriter manufacturers bearing this great name.

AGENTS WANTED THROUGHOUT THE WORLD.

SEND FOR ILLUSTRATED CATALOGUE.

Manufactured and sold by

THE REMINGTON-SHOLES CO.

Of CHICAGO, ILL., U. S. A.

WOLF TIDNER PENSSELAER

R., p. 973.

This newspaper is shown to have been published in the City of New York by Munn & Co., and to have been circulated both in the United States and in foreign countries where the English and Spanish languages are used commercially.

R., p. 226, 227.

Said publication is admitted to have been prepared, inserted and paid for by the Remington-Sholes Company. It appeared in several monthly editions, and among others, the January, February, March and April editions of the year 1899.

R., p. 227.

It will be observed that this publication refers to the "Rem-Sho" typewriter as **"the only typewriter manufactured to-day by a Remington. Strong, reliable and accurate. It represents the second generation of typewriter manufacturers bearing this great name."** The attention of the Court is called to the fact that in the above quoted excerpt the words **"Remington"** and **"Second generation"** are printed in *capitals and bolder type* than the other words in the paragraph quoted. *This advertisement shows an intent to represent to the public the so-called "Rem-Sho" typewriter, or "Remington-Sholes" typewriter as a second generation Remington typewriter*, that is to say, the Remington-Sholes Company is alleged to be the **second generation** of typewriter manufacturers bearing **"this great name — Remington."** It is "this great name" — "Remington"—and the association of the Remington-Sholes Company and its product therewith, to which the attention of the public was called *in capital letters and in type much bolder and more conspicuous than the other words in the paragraph.* This paragraph clearly conveys the idea that *E. Remington & Sons* were the *first* generation of typewriter builders, and that the *Remington-Sholes Company* was the *second* generation of typewriter manufacturers bearing the

name of "**Remington.**" It needs no argument to show that *this advertisement discloses an intent to trade upon the reputation of the name "Remington," and to pirate the good-will of appellee's business.*

In the court below, counsel for appellants contended that the statement in appellants' catalogue, etc., that the Remington-Sholes was the only machine then made by a Remington was true inasmuch as Franklin Remington was general manager of the Remington-Sholes Company. That this statement was *untrue* is clearly shown by appellants' catalogues, advertisements, signs, etc., in all of which it is stated that the machines are manufactured by the Remington-Sholes Company. Moreover, Franklin Remington did not superintend the manufacture of the Remington Sholes or Rem-Sho machines, and possessed no practical knowledge of or skill in typewriter manufacture. This branch of the business was looked after by Sholes, Hochklassen and Fay. Franklin Remington was *advertised* as general manager, but most of his time was spent in visiting agents and dealers in this country and in Europe and aiding them in their efforts to sell the so-called Remington-Sholes typewriter.

Of the 3,000 shares of the capital stock of the Remington-Sholes Company he held only 150 shares, given him by Fay.

In no *truthful* sense could it be said that Remington manufactured the machines. This, however, was not the only untruthful statement by the Remington-Sholes Company in connection with their machine and business, for they also said that the Remington-Sholes Company was the "second generation" of typewriter builders under the name of "Remington," and in their instructions to salesmen they asserted that "the same standard of excellence" was being maintained in the manufacture of the Remington-Sholes machine as all other goods which had been produced by the Remingtons.

These statements and representations clearly implied that the Remington-Sholes Company was the

successor or a branch of the old concern, and that its machine was *the genuine* "Remington typewriter." Obviously those assertions and representations were *untrue*. It is therefore manifest that the contention of counsel for the appellants that a defendant may not be enjoined against telling the truth are not of force in the case at bar.

Beyond question the term or name "Remington" means a writing machine made by complainant-appellee or its predecessors at the old establishment, and having a certain standard of excellence in quality and action. The defendants-appellants ignore the distinction between using the name Remington as the surname of a person connected with their business, and using it as the name of complainant-appellee's machines and business. Appellants are not entitled to use the name Remington in its secondary sense and thereby state a falsehood.

The purpose and intent of these statements were not to obtain the benefit of the reputation of Franklin Remington, *but to gain the enlarged reputation which had for many years belonged to the Remington typewriter, and to the old business of which appellee was and is the lawful successor. Their object was not to tell the truth but to make the public believe that the "Remington-Sholes" or "Rem-Sho" machine was the genuine Remington typewriter.*

PHILADELPHIA EXPOSITION.

In December, 1899, an Exposition was held in the City of Philadelphia under the auspices of the Commercial Museums and Franklin Institute, known as the National Export Exposition. At that Exposition typewriters were exhibited, and, among others, the Remington-Sholes Company exhibited its writing machine. Mr. John F. Soby, who attended the Exposition, testified that there was a *sign which attracted his attention*, placed on a type-

writer, that was being exhibited in front of the Remington-Sholes Company's booth, and the wording of this sign was as follows: "*Two generations of typewriters.* This machine was invented by C. Latham Sholes of Milwaukee in the early 60's. *Later manufactured by E. Remington & Sons, Ilion, N. Y. It is the original article itself.* The Rem-Sho Typewriter was brought out by Zalmon G. Sholes, the son of the inventor, *and Franklin Remington, the son of the manufacturer of this machine.* An instance of the familiar adage that 'History repeats itself.' "

R., pp. 498, 499.

Appellants' witness, Frank L. Sholes, testified concerning the signs of the Remington-Sholes Company and said, among other things, *that there was a white card sign lettered:* **"Our foreign agencies," and then were given the different cities in Europe and the balance of the world outside of the United States in which the Remington-Sholes Company had offices;** and there was a small card sign marked "History repeats itself." Sholes says the latter sign was in substance, *that the Rem-Sho machine was invented by the sons of the original inventor and manufacturer of this machine,* meaning an old Sholes & Glidden typewriter, manufactured by the Western Electric Company of Chicago, Ill., upon which said sign was displayed.

R., pp. 1172, 1173.

The witness was unable to give the exact wording of the sign on the Sholes & Glidden Machine. He said that it was one that was manufactured before E. Remington & Sons began the manufacture or sale of what was for a short while designated Sholes & Glidden typewriter. It was not exactly like the Sholes & Glidden, manufactured by E. Remington & Sons, but was substantially the same.

R., pp. 1189, 1190.

The sign was placed on the Sholes & Glidden typewriter, *manufactured by the Western Electric Company*, to attract attention to the Remington-Sholes exhibit, *and this particular machine had nothing to do with the Remington-Sholes machine*, or with any typewriter manufactured by the Remington-Sholes Company, except their family history; *thus admitting that this so-called Sholes & Glidden machine, which he displaped had no connection with E. Remington & Sons.*

He also stated that he desired to make known the connection of *Mr. Remington with his father's firm of E. Remington & Sons.* He put the sign up there to show that Z. G. Sholes' father had invented the Sholes & Glidden machine, *and that F. Remington's father had been the original manufacturer thereof.*

R., pp. 1191, 1201.

Such is the *lame excuse* given for the use of this sign and the association of the Remington-Sholes machine *with appellee's business and product.* The attention of the Court has already been called to the fact that *whatever of value as regards good-will or otherwise, was attached to the old Sholes & Glidden writing machine, belongs to appellee in virtue of the fact that it is the sole successor of the entire typewriter business which was formerly carried on by the corporation of E. Remington & Sons.* Sholes himself admits that the wording of the sign as testified to by Mr Soby, *whose evidence in this regard is uncontradicted*, **was not strictly true**; that is to say, if the sign read, "This machine, etc." He admitted that the words as quoted to him in xQ. 174, pp. 1193, 1194, of the Record, were substantially correct. This particular machine was manufactured by the Western Electric Company, *and he admits that the wording of the sign was, therefore, untrue.*

R., p. 1194.

If this machine was manufactured by the Western Electric Company, it had no connection with E.

Remington & Sons as manufacturers. But it is perfectly clear that the purpose and intent of the appellants' agent was *to associate and connect the Remington-Sholes machine, through the inventor and promoters thereof*, with E. Remington & Sons and appellee's product, known as the "Remington" typewriter. C. Latham Sholes was only one of several inventors of the *Sholes & Glidden* machine, as its name plainly implies, *and Franklin Remington's father was not the manufacturer of the Remington typewriter*, but was connected with the **corporation**, which manufactured what was for a short time known as the Sholes & Glidden typewriter.

Misstatements of fact, i. e, half truths, under the circumstances disclosed in this case must be regarded as evidence tending to show fraudulent intent. An intent to trade upon the reputation of another and calculated to confuse and mislead the public and render complainant's good will precarious. They showed an intent to trade unfairly with appellee.

PETMECKY ADVERTISEMENTS.

On the 11th day of March, 1899, an advertisement and notice of the Remington Sholes typewriter appeared in the *Austin Daily Tribune*, and on the next day, to wit, March 12, 1899, the same advertisement or notice appeared in the *Austin Daily Statesman*. This advertisement was, undoubtedly, inserted by one Fred Petmecky of Austin, Texas. *Petmecky was appointed a dealer by appellants' witness, Baldwin, who said that at the time these advertisements were inserted he thought that Petmecky was a dealer for the Remington-Sholes Company, and had a Remington-Sholes machine in his possession.*

Baldwin stated that he imparted information to Petmecky about the machine, and left catalogues with him at the time he appointed him a dealer. Baldwin's attention being called to the catalogues

containing the statement "the only machine now made by a Remington," was unable to say whether or no he left such catalogues with Petmecky, but as heretofore pointed out, he testified, that he frequently made that statement to dealers and agents, and it is, therefore, plain that Petmecky obtained his information, in that regard, either from Baldwin or the catalogues left with him.

R., pp. 1028, 1029.

In those *advertisements and notices* appeared the statement contained in the *catalogues*, etc., that "*the only machine now made by a Remington is the new Remington-Sholes typewriter.*" These advertisements show that the same seeds had been sown and taken root in Austin as in other places, *and that emphasis was placed upon the alleged fact that the Remington-Sholes machine was the only one made by a Remington, and was the product of "the brain of the cunning Remington.*" The manifest intent in this case was, as in many other connections, to instill into the minds of the public the idea that this so-called Rem-Sho" machine was the only *genuine* Remington typewriter on the market.

R., pp. 908, 909, pp. 380, 381.

PHONETIC JOURNAL.

That these statements of appellants, above quoted, were extensively circulated and scattered over the world is made manifest by reference to complainant's exhibit, Phonetic Journal of Nov. 12, 1898. (R., p. 887.) The Phonetic Journal is published in England and circulated largely in Great Britain and Ireland and in the British colonies, *and to some extent in the United States and elsewhere.*

R., pp. 229, 230.

In this advertisement, which appears over the name of Remington-Sholes Company of 28 Basinghall street, London, E. C., will be found the state-

ment, concerning the Remington-Sholes typewriter, that "*It is the only typewriter manufactured by a member of the well-known Remington family, the original manufacturers of the Remington Standard typewriter.*" * * *

SYNDICATE PROSPECTUS.

In "Complainant's Exhibit Remington-Sholes Syndicate Prospectus" (R., pp. 903, 906), it is stated that the Rem-Sho machine embodies the latest and best improvements known in typewriting machines, *representing, as he (Franklin Remington) does, the second generation of the family in the business—his father being the original maker of the Remington Standard Typewriter.*"

It was admitted by appellants' counsel that the Franklyn Remington referred to in this prospectus was the same Franklin Remington who was then connected with the Remington-Sholes Company, and that the statement therein, that he would join the Board after allotment, *was put into said prospectus with his consent and approval.*

R., p. 457.

CARCABA'S ADVERTISEMENT.

In January and February, 1899, one William Carcaba, who was appointed a dealer by Page, Dennis & Co., or the defendant company, and afterwards continued as dealer by the Remington-Sholes Company, inserted an advertisement in the St. Augustine Daily Herald, a newspaper published and circulated at St. Augustine, Fla.

R., pp. 192–196, 1353–1355.

A copy of said exhibit will be found in R., p. 979, and is here reproduced.

Re-mem-ber THE name.

The Remington-Sholes Standard Typewriter.

Built for durability, speed, manifolding and permanent allignment. Combining the leading features of the principle high grade machines, and adopted by the present World's Champion, C. H. M'Gurrin.

IT'S USE IS IT'S PROOF.

Write for Catalogue.

WM. CARCABA. AGENT
St. Augustine Fla.

Page 327, C. Ex.

It is also admitted that the *electrotypes* for the illustration of the typewriting machine appearing in the advertisement, in said St. Augustine Daily Herald, *were furnished to him by the Remington-Sholes Company on the first day of November, 1898.*

The appellants' machine, in the advertisement of Carcaba, is designated as "**The Remington-Sholes Standard Typewriter,**" and is signed "**Wm. Carcaba, Agt., St. Augustine, Fla.**" This advertise-

ment, in very large capital letters, cautions the public to **"Remember the name."** Appellee's witness, Brooks, interviewed Carcaba at his place of business in St. Augustine, Fla., who informed him that he was selling the Rem-Sho typewriter, which was *an improved Remington machine*, invented by the son of the inventor of the Remington typewriter, who had associated with him Mr. Sholes of Chicago.

R., p. 195.

It appears that Carcaba's advertisement was called to the attention of Mr. Fay, the president of appellant's principal, *by one Seddon*, and that on or about the 26th of February, 1899, Fay wrote to Carcaba, and among other things said: "Our Mr. Seddon, who has just visited St. Augustine, sends me a copy of an advertisement, which you have printed in one of the St. Augustine papers, in which after the words 'Remember the name,' you give it as follows: 'The Remington-Sholes Standard Typewriter.' **Now, this is not the name of our machine.** * * * The name of our company, which appears upon the cross bar in front of the machine, is the 'Remington-Sholes Company.' **The use of the word 'Standard' in this advertisement is exceedingly objectionable to us, for the reason that it seems, when used in connection with our company name, to be calculated to confuse the buyer as to whether he is purchasing our machine or the well-known Remington Standard. Such use of the word 'Standard' is not only unfair, but extremely dangerous, as you are liable to be sued upon it at any time.** * * * A suit is already pending, brought by Wyckoff, Seamans & Benedict, against the Howe Scale Company, **raising this very point of deception of the public by one of our agents,** which we never intended, and have always guarded carefully against. **For your own protection as well as ours, we beg that you will make the correction promptly, and if you have sold any machines**

or invoiced them as 'Remington-Sholes Standard Machines,' we beg that you will let us know the facts in detail, as they may be of vital importance in the suit now pending.

This letter is, in substance and effect, *an admission by the President of Remington Sholes Company, that the advertisement of Carcaba was calculated to confuse the buyer of typewriters as to whether he was purchasing the Remington-Sholes or the well known Remington, or Remington Standard typewriter.*

It is an undoubted fact that Carcaba's advertisement was calculated to mislead the ordinary purchaser, *and it is a good illustration of what unscrupulous agents and dealers have done and would do, if appellants were permitted to use the trade-names of appellee.* Fay's sensitiveness in this instance, as disclosed by his letter, appears to be confined to the word "Standard," and while that word has been used, more or less, in connection with the appellee's machines and business, for a good many years, it does not constitute the salient or essential part of appellee's trade-name.

It has already been shown that *the essential part of appellee's trade-name is the word "Remington," which word has acquired a secondary distinctive meaning—a meaning that it designates the appellee's product and appellee's writing machines and business only.* It is a little singular that Fay should have been so *sensitive* in respect of the use of the word "*Standard*," by Carcaba, and yet *utterly obtuse and oblivious to the use of the word "Remington" by his company and their agents and dealers.* In its answer Howe Scale Co. alleges that appellee's machines have been commonly spoken of and referred to in trade parlance as the "Remington Standard," but *appellants abandoned that contention and practically conceded that appellee and its business were generally known as the "Remington Typewriter Company," and its product as the "Remington typewriter."* They proved in this case that the word "Standard" has no other force

or significance in the typewriter trade than that of indicating that a certain machine was of standard quality.

Appellants witness, Baldwin, said that "The commonly accepted meaning of the word 'Standard,' among typewriter salesmen and, also, among typewriter users throughout the country, was any machine of $100 value of a standard make." He said that if a man asked for a standard typewriter he only meant a machine of $100 value.

R., p. 1016.

In cross-examination Baldwin testified that the word "Standard" when used in connection with any typewriting machine, or in any advertisement of a typewriting machine, *did not indicate its origin, or point to any particular maker.*

R., pp. 1034, 1035.

When pressed however with the question whether or no the words "**Remington-Sholes Standard Typewriter**" were a proper designation of the "Remington-Sholes" or "Rem-Sho" machine, he said that he would not use those words in an advertisement of that machine, *because it was not the name thereof, and it might be construed as a misrepresentation, for the reason that the word "Standard" had been used in connection with the Remington machine manufactured by the appellee.*

R., pp. 1035, 1036.

In the end he appears to have reached the same conclusion as did *Fay*, viz., that the use of the words "Remington-Sholes Standard Typewriter" might be construed as a *misrepresentation*, but like Fay he ignored the far more important fact that in all cases the name "*Remington*" was used by the Remington-Sholes Co. in connection with its machines.

If the use of the word "Standard"—common in the trade—was calculated to mislead, *a fortiori* the employment of the name "Remington" by appellants which was and is understood in the trade and by the public in its *secondary* sense, would deceive the ordinary purchaser of writing machines.

As regards the force and significance of the word "Standard" in the typewriter trade, similar evidence to Baldwin's, was given by appellants' witness Hobbs.

R., pp. 1085–1089.

It, therefore, seems to be conceded by Fay and Baldwin that the use of the words "The Remington-Sholes Standard Typewriter" by Carcaba was calculated to confuse and mislead the public.

Appellants' contention that the intending purchaser, if he were confused by Carcaba's advertisement, would have been fully enlightened when he visited the Carcaba store is inadmissable, and not of force, when it is seen what this *unscrupulous dealer had done and was likely to do in the premises.*

DIAMOND SUPPLY CO.

The attention of the Court is invited to another similar advertisement, which was inserted and published in the *St. Joseph Sunday Herald of date April 30, 1899*, a well-known newspaper published in St. Joseph, Mo., and circulated there and in that vicinity.

R., pp. 379, 380.

This advertisement was prepared, paid for and inserted in said newspaper by the Diamond Supply Company of St. Joseph, Mo., which was at that date a local agent or dealer of the Remington-Sholes Co., and as such was selling or offering for sale the Remington-Sholes typewriter, at the time this advertisement was published. It is admitted that the machines, so offered for sale by the Diamond Supply Com-

pany, were manufactured by the Remington-Sholes Company of Chicago. A copy of said advertisement is here reproduced.

R., pp. 521, 522, 958.

and monopolies and to provide proced- | servative and clear-sighted majority

REM-SHO

REMINGTON-SHOLES

STANDARD TYPEWRITER

New Models, Nos. 4 and 5, $100 List. The finest Machines ever put on sale.

Call and examine, and test these new models.

EVERY MACHICE GUARANTEED

High-Class Goods

DIAMOND SUPPLY CO.

Leading HIGH GRADE BICYCLES of America.
Repairing, Sundries, Renting.
319-321 North Third Street
St. Joseph, Mo.

A Machine

Not in the Trust

WILL NOT COST YOU $100

As we make a VERY LIBERAL DISCOUNT FOR CASH.

A STANDARD HIGH-GRADE MACHINE

Guaranteed equal to the best. Remarkable for its Simplicity, Lightness of Touch, and small number of parts. Ball Bearing, automatically locked basket shift, permanent alignment, universal key board.

At A PRICE you have wished for.

It will be observed that in this advertisement the machine of Remington-Sholes Co. is designated.

REM-SHO
REMINGTON-SHOLES
STANDARD TYPEWRITER.

The advertisement refers to new models Nos. 4 and 5, contains a cut of the machine, and states that the machine is guaranteed. In several respects it is similar to the advertisement of complainant-appellee, in the same paper, a reproduction of which will be found in R., p. 959.

This advertisement, like Carcaba's, designated the machine as the "Remington-Sholes Standard Typewriter," *and indicates that "Rem-Sho" was simply an abbreviated name.* The statements of Fay and Baldwin in respect to the Carcaba advertisement, and the comments hitherto made thereon, are equally pertinent to the advertisement of the Diamond Supply Company, published in the St. Joseph Sunday Herald.

"Defendant's Exhibit, Diamond Supply Company Contract," will be found in R., pp. 1456 1457, Under this contract the Diamond Supply Company was appointed a local dealer for the City of St. Joseph, Mo., and nearby adjacent territory. The Remington-Sholes Company agreed to fill orders for machines sent in by "Diamond," if properly signed by responsible customers, shipping on board cars from its office at Chicago, Ill.; to bill sales to customers at the prices agreed upon by "Diamond," and to allow "Diamond," as a commission on sales, the excess charged the customer over $60 for No. 2 and $62.50 for No. 3 Rem-Sho machines, and $2 50 for metal cover, with base board, when wanted. All commissions payable to "Diamond" promptly after payment of the customer's account to the Remington-Sholes Company, which was to make its own collections with the assistance of "Diamond." Ob-

viously this was a contract wherein and whereby the Diamond Supply Company was appointed a *local agent* for the Remington-Sholes Company, and received a commission from said company on all sales of its machines made by "Diamond." *It was not the contract of an independent dealer who purceased his machines outright. Hence, the advertisement of the agent, acting within the scope of its agency, was in substance and in effect the act of the principal, Remington-Sholes Company.*

Under the admissions of Fay and Baldwin, the "Diamond" advertisement was calculated to confuse and mislead the public and to injure the appellee's business; and it is ~~as~~ not material that the Diamond Supply Company sold no Remington-Sholes machines, in so far as injunctive relief is concerned. It offered for sale and endeavored to sell the so-called "Remington-Sholes Standard Typewriter," and published such advertisements *as were calculated to mislead ordinary purchasers.*

This advertisement shows that these agents of appellant's principal were unscrupulous and were resorting to unfair means to promote the sale of the Remington-Sholes machine.

FOREIGN PUBLICATIONS AND ADVERTISEMENTS.

The attention of the Court is now called to sundry advertisements in foreign publications, etc., of dealers and agents who offered for sale the Remington-Sholes or Rem-Sho typewriter, *for the purpose of showing that Remington-Sholes Co. had put into the hands of such dealers and agents the means of deceiving the ultimate purchaser of writing machines.* We have hitherto pointed out that the Remington-Sholes Company, now Fay-Sholes Co., is the *real* defendant-appellant in this case, *and that the Howe Scale Company justifies its acts by that which it alleges to be the*

right of the Remington-Sholes Company, and fully identifies itself with that company. It is, therefore, relevant that the Court shall be advised not only as regards what appellants' agents and dealers may do in respect to confusing, misleading and deceiving the public by the use of the names "Remington" and "Remington Company," but also what they actually have done *in the premises.* This evidence is for the benefit of the Court, and to enable it to say whether or no the *ultimate* purchaser is likely to be mislead by the use of the name "Remington," etc., in connection with appellants' business and machines. It is familiar law to this Court that in this class of cases one who puts into the hands of retail dealers an article made by him and so dressed up as to enable such dealers to deceive the *ultimate* purchaser into the belief that he is purchasing the goods of a third person, may be enjoined by the latter.

In Lever *v.* Goodwin, 36 Ch. Div., 1, the Court says: "Now, it has been said more than once in this case, *the manufacturer ought not to be liable for the fraud of the ultimate seller*, that is, the shopkeeper or the shop-keeper's assistant. But that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers *the means of decciving the ultimate purchasers.*"

To the same effect

Johnson *v.* Orr-Ewing, App. Cas., 219 (1882).

N. K. Fairbank Co. *v.* R. W. Bell M'f'g Co., 77 Fed. Rep., 869, 878.

In Reddaway *v.* Banham (1896), App. Cas., 219, Lord Macnaghten said: "At Banham's works where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; *abroad*, to the *German* manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's, it can mean nothing else."

These observations show that the House of Lords considered it pertinent to inquire whether or no the *ultimate foreign purchaser* was likely to be deceived.

The Remington-Sholes Company *advertised* the fact that it had "foreign agencies" and "branch offices" for the sale of its writing machines, as will be seen by reference to defendant's exhibit Remington-Sholes sign circular letter, R., p. 1448, and a catalogue of the Remington-Sholes Company, R., p. 1455. **By reference to the title-page of the catalogue it will be observed that said company had "branch offices" in London, Copenhagen, Rotterdam, Paris, Berlin, Leipsic, Moscow, Bombay and Vienna; and by reference to the letter above referred to, it will also be seen that it had branch offices in St. Petersburg, Russia, and Hamburg, Germany.**

Frank L. Sholes testified that at the Philadelphia Exposition said company displayed a sign consisting of a "white card sign lettered '*Our Foreign Agencies*,' and it gave *the different cities in Europe and elsewhere in which the Remington-Sholes Company maintained offices.*

R., p. 1172.

It also appears in the testimony of some of appellants' witnesses, and from exhibits which were introduced in evidence in the case at bar, that the Remington-Sholes Company established various agencies and dealerships in foreign countries, through which its machines were advertised for sale and sold.

(1) In Complainant's Exhibit, Berlingske Political Advertising Tiding, dated March 20, 1899, an advertisement of the so-called Remington-Sholes typewriter appeared, a reproduction of which will be found in R., p. 957. The translation of said advertisement will be found in R., p. 885, and reads as follows: "F. REMINGTON, Jun., manufactures the renowned Remington-Sholes Typewriter. The Office Inventory and Typewriter

Co." The attention of the Court is called to the prominence given, in the advertisement, to the name "Remington." R., pp. 464, 466.

(2) "Complainant's Exhibit Remington Imperial Booklet and Translation" will be found in R., pp. 962–966 and 888–891. This booklet or catalogue is printed in the Russian language, and was issued by an agent or dealer for the sale of the Remington-Sholes typewriter in St. Petersburg. It will be observed that in this booklet (see translation R., p. 888, *et seq.*) the **Remington-Sholes** machine is referred to as the **"Remington Imperial."** Among other *illuminative* statements in this publication, is the following: "The factory, 'Remington Standard,' does not belong to any of Remingtons and passed into new hands: Wyckoff, Seamans & Benedict long ago, at the time when F. Remington and Mr. Sholes, the inventor of all Remingtons, left the business and establishing a factory of their own, conducted the same on as solid basis as before. * * * When the principal inventor, Sholes, left 'Remington Standard business,' the last hope for further improvement of this typewriting machine was gone. * * * The latest model brought out this year is the *Remington Imperial.*"

It will be seen that this Russian agent or dealer was trading on the name *Remington* and had dropped the name "Sholes," which forms no part of his designation of the so-called "Rem-Sho" tppewriter.

It is scarcely necessary to say that this booklet is replete with untruths.

On the back cover thereof (R., p. 966) it will be seen that there is a simulation of one of appellee's trade-marks, to wit, a seal bearing certain words, and the representation of a writing machine, *thus showing an intent to imitate appellee's seal trade-mark.*

(3) In Complainant's Exhibit St. Petersburg Gazette, is an advertisement, dated Dec. 14, 1899.

originating from the same source as the one last above mentioned. *The Remington-Sholes machine is therein designated as the "Remington Imperial"*

R., pp. 891, 967, 502–507.

(4) Complainant's Exhibit Novoe Vremya advertisement will be found in R., pp. 893, 894, 968, 502–507. *The Remington-Sholes typewriter is there designated as the "Remington Imperial,"* and is said to be manufactured by F. Remington and Z. Sholes of Chicago. *It is also stated that the representative for the whole of Russia is I. J. Hagen of Moscow.*

(5) Complainant's Exhibit Office Inventory and Typewriter Company, Limited, advertisement, is an illuminative one, and clearly shows that this concern was trading on the name "Remington," and endeavoring to appropriate the good will associated with that name. This advertisement will be found in R., pp. 896, 899 and 974, 978. In the opening paragraph of this circular, issued by the Office Inventory and Typewriter Company, Limited, of Copenhagen, Denmark, the authors say: "We herewith beg to hand you *our prospectus of the Remington typewriter sold by us and called Remington-Sholes Chicago.* These machines are invented by the young Mr. F. Remington and Mr. Sholes conjointly, and are a considerable improvement upon ~~the~~ the pale of the older systems." * * * "Remington-Sholes, Vini; Vidi; Vici; **new model 'Remington.'** Most solid construction." Obviously this concern here represents the Remington-Sholes typewriter to be *the Remington typewriter*, and the machine which it is selling *as a new model Remington.*

R., pp. 896–899, 654.

(6) In Complainant's Exhibit Newald-Kondrup letter and envelope (R. pp. 969–970), the court will note the fact that the name Remington is more conspicuously printed than any other

word in said letter, and that on the envelope a list of *foreign* offices is given where the Remington-Sholes machines are sold.

R., p. 655.

(7) **Complainant's Exhibit, Every Eighth Day,** a newspaper published at Copenhagen, Dec. 25, 1899, contains a picture of Mr. Franklin Remington, which is referred to therein as follows: "We reproduce here a photograph of one of the most known typewriter inventors, *Mr. Remington, who has recently paid a visit to Copenhagen in order further to work for the use of his machine in this capital, where he is represented by the New Limited Company, 'The Office Inventory and Typewriter Company,'*" which is the same concern whose circular is above referred to. It appears from this publication that Mr. Franklin Remington, the so-called manager of the Remington-Sholes Company, had paid a visit to Copenhagen and had aided and assisted the Office Inventory and Typewriter Company in the sale of the Remington-Sholes machines which they designated as **"Remington typewriters," and "New Model Remington."**

R., pp. 464–466, 907.

(8) **Complainant's Exhibit, Wyckoff, Seamans & Benedict, advertisement Nos. 1 and 2, R., p. 961,** shows and illustrates the method of advertising then employed by complainants, both in this country and in foreign countries, in the sale of its machines. On pages 882 and 960, will be found a Russian advertisement of the Remington-Sholes typewriter, which was clearly intended to simulate the advertisements of appellee above referred to.

R., pp. 655–656, 364, 375, 376.

(9) **Complainant's Exhibit, Russian Newspaper No. 338,** contains an advertisement inserted therein by T. I. Hagen, of Moscow. The original will be found in R., p. 984, and a translation thereof on p.

983. It is stipulated (R., pp. 660–661) that this advertisement was published in said paper at Moscow, Russia, on the 10th day of December, 1899; that it was circulated at Moscow, Russia; that the advertisement was inserted or caused to be inserted therein, and paid for by Hagen; that the translation of said advertisement is a correct one; that Hagan at the time of said publication had the exclusive right for the sale in Russia of "Rem-Sho" or "Remington-Sholes" typewriters; that the machines so sold, or offered for sale, were manufactured by Remington-Sholes Co.; **that said advertisement was prepared by Hagen from an affidavit made by Franklin Remington before the American Consul at Moscow, Russia;** that the affidavit of said Remington was made for the purpose of publication by said Hagen, and the same is conceded to be correct in all respects except as to the first paragraph, which it is alleged should have read, "1. That I am the son of the original manufacturer of the Remington typewriter;" whereas in the notice or advertisement inserted in said newspaper it reads, "That I am the son of the original *inventor and manufacturer* of the 'Remington' typewriter." The only difference being that appellants allege that Remington did not state in his affidavit that he was the son of the original *inventor*, etc. *Admitting this to be true, it only goes to show that this dealer did not hesitate to make any statement that would aid him in selling the "Remington-Sholes" machine as and for a Remington.* The stipulation and this advertisement plainly show that **Franklin Remington,** the so-called manager of Remington-Sholes Co., was in **Russia** and there made this affidavit for the purpose of publication by **Hagen,** and to aid Hagen in his unlawful design of selling the "Remington-Sholes" typewriter as and for what he designated in his advertisement as the **"Remington Imperial,"** which simply meant that the machine was a **"Remington"** of the highest quality or class.

Referring to the translation of this advertisement (p. 983), the Court will observe that Remington stated in his affidavit that "On my arrival in Moscow from America, I was informed that various false reports respecting my typewriters are being spread by unfair competitors. *I hereby declare that I have given official testimony to the American Consul, as follows:* 1. That I am the son of the original (inventor and) manufacturer of the Remington typewriter; 2. That I am the only descendant of Remington at the present time engaged in the manufacture of typewriters; 3. *That all other machines bearing the name 'Remington' are made and sold by other parties, who exclusively, in the interest of their own material advantage, make use of the name 'Remington';* 4. That my machines, manufactured in Chicago, are known here by the name of '*Remington-Sholes*,' * * *; 5. That the only authorized agent for the sale of the *Remington-Sholes*, in the whole of Russia, is T. I. Hagen * * * **General Manager of the Remington-Sholes Co., signed Franklin Remington.**" As above said, it is conceded that this is a *correct* copy of Franklin Remington's affidavit, made before the United States Consul at Moscow, to aid Hagen in the sale of that which Remington calls "my typewriters." This affidavit of Remington, which was published by Hagen, *contains the usual misstatements of fact*, and was well calculated to injure the good-will of complainant's business, and aid Hagen in selling "my machines" as and for the "Remington" typewriter. As heretofore pointed out, Franklin Remington's father was never the manufacturer of any typewriter. Franklin Remington was not then *personally* engaged and never had been so engaged in the manufacture of writing machines.

His statement, in the *third* paragraph, that all other machines bearing the name "Remington," except his, were made and sold and so designated by parties—meaning appellee—in the interest of their own material advantage, was calculated to

produce in the mind of the public the belief that the appellee had no *lawful* right to use the name "Remington" in connection with its product, *and that the only genuine Remington typewriter was the Remington-Sholes machine, or what Remington's co-conspirator, Hagen, designated the "Remington Imperial."* It is perfectly plain that **Franklin Remington** made his affidavit in Russia, *and was there as the representative of the Remington-Sholes Co.* to aid and abet Hagen in his *fraudulent* scheme to divert from appellee the good-will associated with the name "Remington, which had long been a designation for appellee's machines and business.

(10) "**Complainant's Exhibit Russian News of the Day**" is another choice advertisement of this man **Hagen.** It will be found in R., p. 987, and a translation thereof at p. 986. It was stipulated by the defendants-appellants that the publication known as "Russian News of the Day" was published at Moscow, Russia, at the date of said copy; that the advertisement of the Remington-Sholes typewriting machine was inserted or caused to be inserted therein and paid for by **T. I. Hagen of Moscow**; that the translation annexed to said newspaper is a true and correct translation of said advertisement and that Hagen had at the time of said publication the exclusive right for the sale in Russia of the Remington-Sholes writing machine, manufactured by the Remington-Sholes Company of Chicago.

R., pp., 661, 662.

This advertisement of the "Remington-Sholes" reads as follows: "The 'Remington-Sholes typewriters' which are sold in my store and by my agents are genuine and not imitations, *Surpassing in merit all machines bearing the name Remington in consequence of their improved construction, and that the inventors of these machines, S. Sholes and Franklin Remington, are both the sons of the de-*

ceased manufacturers of the Remington Standard and 'Special.'

"These genuine 'Remingtons,' *made by* **Remington-Sholes,** *are sold in Russia and bear the firm name of* **T. I. Hagen,** *representative for the whole of Russia.*" * * * It needs no argument to show that the advertisements of Hagen were *unfair and fraudulant* in character, and were calculated to displace and divert the good will of appellee's business, *and to cause the public to believe that the Remington Sholes machine (Remington Imperial) was the only genuine Remington machine in the market.* The Remington-Sholes Co.'s so-called manager, Franklin Remington, aided and abetted Hagen in his unfair and fraudulent scheme.

It may be suggested that in behalf of the Remington Sholes Company, that it did not sell its machines *directly* to this Russian dealer, Hagen, *and that he got them through an intermediate agent or dealer;* but we submit that *this is wholly immaterial,* since the *natural* consequence of marking its writing machines so as to cause them to bear the name 'Remington' in the market was to deceive the *ultimate* purchaser. and **such deception will be restrained even though the original purchaser or dealer was not deceived.** As aptly said by the Court in Singer Mfg. Co. *v.* Loog, 18 Ch. D., 412, adopted by Lord Macnaghten in Reddaway *v.* Benham (1896), A. C., 179: "No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign, symbol, device, *or other means,* whereby, without making a direct false representation of himself to a purchaser, who purchases from him. *he enables such purchaser to tell a lie, to make a false representation to somebody else who is the ultimate customer.*"

In the same case, Cotton, L. J., observed: "*If a man does that, the natural consequences of which* (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to

him) *is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable.*"

As above observed, the advertisements of Hagen, taken in connection with Remington's affidavit, the stipulations made on behalf of appellants, show that Hagen was making *unfair and fraudulent* representations, which were calculated to deceive the *ultimate* purchaser, and *Remington, the representative of the Remington-Sholes Company, was in Russia aiding and abetting him in the premises.*

(11) There remains to be considered one other Exhibit relating to foreign matters, to which the attention of the Court will be called, to wit, **"Complainant's Exhibit, photographs Nos. 1 and 2 Remington-Sholes retrospective exhibit at the Paris Exposition."**

R., pp. 1001, 1002.

It appears from the testimony of **John F. McClain** (R., pp. 604–611), that the "Remington-Sholes Company" had an Exhibit at the Paris Exposition in the year 1900.

Franklin Remington was there in charge of that Exhibit. This company exhibited five or six of its writing machines, and in connection therewith "*what they called the original Remington machine, from which their present models were evolved.*" The witness identified the photographs, Nos. 1 and 2, as correct reproductions of the "Sholes & Glidden Typewriter," being the first writing machine manufactured by E. Remington & Sons.

An announcement was displayed upon and in connection with this machine. A short distance away from the regular exhibit of the "Remington-Sholes" machines was displayed, what they termed their **"Retrospective Exhibit,"** which consisted of the machine shown in the reproductions produced from photographs thereof, **together with photographs of three generations of the Remington family—the grandfather, father and Mr. Franklin Remington.**

R., p. 611.

G. J. Wallau, who had charge of appellee's Exhibit at this Exposition, testified that the Remington-Sholes Company exhibited a number of Remington-Sholes typewriters, having carriages of different widths and of different colors. *They exhibited a hand-made model of the Sholes & Glidden machine, which was afterwards made by E. Remington & Sons.* This model appears to have been loaned to them by the Buffalo Historical Society. On this model was displayed an announcement which could be read, and which he says "was probably read more than any other announcement in the typewriter section." The announcement read as follows: **"The Remington-Sholes Company.** This machine is the first practical typewriter ever made, and was the invention of Mr. C. Latham Sholes, the father of the inventor of the Rem-Sho typewriter. It was later improved and manufactured by the well-known firm of **E. Remington & Sons.** This machine, though crude, contains many of the principles upon which the Rem-Sho typewriter, the invention of the younger Sholes, is built."

Wallau said that Franklin Remington was invariably present, when anything of importance to the interests of typewriter exhibitors was about to occur. He also stated that the Remington-Sholes Company had an office or agency in Paris, where the Remington-Sholes machines were offered for sale. The name Remington-Sholes Company was on a sign over the door of the office and the letter heads and advertising matter all bore the name of said company. Franklin Remington was frequently seen by him in company with the local manager of the office in Paris.

R., pp. 612-617.

It will be observed that the *statements and representations*, concerning the origin, etc., of the Remington-Sholes typewriter, set forth in the announcement upon the Sholes & Glidden typewriter, shown

in complainant's exhibit photograph No. 2, etc. (R., p. 1002), are similar to those hitherto mentioned. As heretofore noted, the *true* facts in the premises were not stated, and the *original* machine, out of which appellee's product was evolved, *was used by the Remington-Sholes Company as a basis for, and means of, associating and connecting its machine and business with that of E. Remington & Sons, the predecessors of appellee.* In other words, here, as in other connections, the Remington-Sholes Company endeavored to divert to itself the good-will, associated with the name "Remington," and thereby rendered the good-will of appellee's business precarious.

THE PUBLIC HAS BEEN MISLED.

(1) From December, 1897, until July 19, 1898, **Andrew J. Scorer** was employed by the Howe Scale Company in Pittsburg and vicinity as a salesman to sell the Remington-Sholes typewriter.

R., pp. 345, 346.

While so engaged, he canvassed Pittsburg and the surrounding towns, for the purpose of selling the Remington-Sholes typewriter.

Scorer says he was informed by appellants' witness, Baldwin, that his business was to go out and sell typewriters, *and tell anything that was necessary to sell them.*

R., pp. 347, 348.

Scorer also states that *he understood that Mr. Franklin Remington was one of the Remingtons who manufactured the Remington Standard, and that he told prospective purchasers that he was one of the same Remingtons.*

R., p. 350.

He endeavored to convince purchasers that the Remington Sholes was the same thing as the Remington Standard, and for a long time he believed such to be the fact.

R., p. 360.

He was led to believe that a Mr. Franklin Remington, who was connected with the Remington typewriter, was engaged in the manufacture of the Rem Sho, and believed the machine was made by Mr. Remington.

R., p. 362.

He represented to prospective purchasers that the Rem-Sho typewriter was manufactured by Mr. Remington, who was connected with the Remington typewriter.

R., p. 363.

One Echols, who was a representative of the Rem-Sho typewriter, induced him to come to Pittsburg to sell that machine, and gave him to understand that Mr. Remington, who was manufacturing the Rem-Sho machine, was, or had been, connected with "the Remington."

R., pp. 364, 365.

Among other things, Scorer testified that he *believed* that one Mrs. Vance obtained a Remington-Sholes machine, supposing it was manufactured by the "Remington people." This was the only person alluded to by Scorer in his direct-examination as being one whom he believed to have purchased a Remington-Sholes machine, thinking that it was manufactured by the "Remington people."

In cross examination, Scorer was requested by appellants' counsel to name any other persons whom he believed had purchased Remington-Sholes machines under the impression, or belief, that it was a Remington machine, and, in answer thereto, he mentioned the names of three other persons. *Insofar*

as the witness testified concerning persons other than Mrs. Vance, he did so as appellants' witness and not as appellees'.

Mrs. Vance was subsequently called as a witness by the appellants, for the purpose of showing that when she obtained the Remington-Sholes machine of Mr. Scorer, she was in nowise misled or deceived. She testified that she obtained the Rem-Sho machine in 1897 or 1898, from Mr. Scorer, and alleged that she took the machine upon trial, and that she had different machines for about a year.

R., pp. 1208, 1209.

On her direct-examination, *inter alia*, she was interrogated and answered as follows:

Q. 28. When you took the *Rem-Sho machine* on trial, did you suppose that it was *the same as the Remington Standard*, or was manufactured by Wyckoff, Seamans & Benedict?

Objected to as leading.

A. **I did not think it was quite the same machine as the Remington; I did not know who manufactured it.**

R., p. 1211.

In cross-examination Mrs. Vance testified as follows:

"xQ.47 Did you think or suppose that there were two machines on the market using the name Remington? A. I really did not think anything about it; I wanted to buy a machine and *I wanted a Remington*, and Mr. Scorer heard that I wanted to buy a machine and came in and asked me to buy the Rem-Sho—said that it was a new machine that was just put on the market, and I did not want to take it—I told him I did not care to invest in a machine that had never had any test, and then he put it on trial—said if it wasn't satisfactory, I needn't keep it. **He told me that it was as good**

a machine as the Remington, and that one of the parties who had once been connected with the manufacture of the Remington was in this new company. * * *

xQ. 49. And as I understand you, gotten up by people who had formerly been connected with or manufactured the Remington? A. *He said one man who had once been in the Remington Company was now connected with the new company.*

xQ. 50. And you understood that that man's name was Remington? A. I really do not remember whether he told me that man's name or not, but I think it was the son of the Mr. Remington who was in the Remington Manufacturing Company. * * *

xQ. 64. Now, Mrs. Vance, you will kindly tell me *why*, if you know, or for what reason, as you supposed, *Mr. Scorer stated to you that the so-called Rem-Sho machine was made by people, or was manufactured by some one who had formerly been connected with the manufacture of the Remington machine?*

Objected to as immaterial and irrelevant.

A. *To induce me to give it a trial.*"

Mrs. Vance was subsequently further cross-examined as to a statement which she made on the 14th day of July, 1899, in the presence of Mr. Crean, to his stenographer, Mrs. H. B. Ferguson, who was at that time Miss Stein.

R., pp. 572–576.

Mrs. H. B. Ferguson was called as a witness and testified that she took down, stenographically, the statement of Mrs. Vance and afterward copied the same on the typewriter. She identified the paper shown her as *a correct copy of her stenographic notes.* She said that the statement was read over to Mrs. Vance directly after it was made and copied, and that Mrs. Vance pronounced it to be correct.

R., pp. 577–589.

In her statement Mrs. Vance says: "Mr. Scorer told me the machine he handled was the Remington-Sholes manufactured by the people who had manufactured the Remington machine; * * * my understanding from Mr. Scorer's conversation to the effect that the name 'Remington' was used in connection with the name of the machine he was handling, *gave me to believe that his machine was a species of Remington machine*, and feeling, as I did, that I wanted only a *Remington* machine, I thought I would not be getting away from my preference in taking the machine. With this understanding, I agreed to and did purchase a Remington-Sholes machine." * * * "It occurred to me at that time, and I thought that inasmuch as the people who manufactured the Remington-Sholes formerly manufactured the Remington, that that fact gave them the right to use the word 'Remington' in connection with the name of their machine."

R., pp. 591–593.

Mrs. Ferguson's testimony was fully corroborated by Mr. T. F. Crean.

R., pp. 591–593.

It is perfectly plain, from Mrs. Vance's testimony, that *she understood and believed* that the Remington-Sholes machine was being manufactured by a *Remington*, who had formerly been connected with the manufacture of the Remington Typewriter, and had once been in the Remington Company.

She admitted that she was induced to take the Remington-Sholes machine, and to give it a trial, *because Mr. Scorer stated to her that the Rem-Sho machine was made by people, or was manufactured by some one, who had formerly been connected with the manufacture of the Remington machine.*

This is in substance and in effect about what Scorer said in his testimony, to wit: that Mrs. Vance took the "machine *believing* that it was manufactured by the Remington people."

Appellants called **Mr. John E. Kunkel,** as a witness, who was a member of a law firm, which obtained a Remington-Sholes Typewriter of the Howe Scale Company, through Mr. Scorer.

In cross-examination, Kunkle testified as follows: "xQ. 28. Do you now recall the fact that he (Scorer) made any statement to you to the effect that the *Remington-Sholes machine*, or Rem-Sho machine, *was made by a concern that had a Remington associated with it*? A. *I understood from him that there was a person who had been connected with the manufacture of the Remington machine that was interested in the manufacture of the Rem-Sho*, but whether his name was *Remington* or not I do not recall; *my recollection, however, is that that was the name he gave, but at that time this person had severed his connection with the Remington people entirely.*"

R., p. 1366.

Kunkle's statement is in entire accord with Scorer's testimony, *that for a long while he believed that Mr. Remington, who was or had been connected with the Remington Typewriter, was engaged in the manufacture of the Remington-Sholes machine*, and says that he was led to this belief by statements made to him by agents and representatives of the Remington-Sholes Company. In other words, notwithstanding he was *a salesman of appellants, and was selling the Remington-Sholes machine*, he for a long time *believed*, that that machine was manufactured by a person *who had been connected with and engaged in the manufacture of the Remington Typewriter.*

True, Baldwin denied that he told Scorer to tell anything that was necessary to sell Remington-Sholes machines and alleged that he *cautioned* Scorer against making any *misrepresentations, or using deception* in any manner, *thereby implying that there was danger of misapprehension and deception in the sale of this typewriter.* But in this

connection, the Court will bear in mind that Baldwin *admitted* that he had stated to *prospective* purchasers of typewriters, as well as to *agents* and *dealers* of appellants that the Remington-Sholes machine was "*the only typewriter now made by a Remington*"; and when asked **what his object was in telling prospective buyers, or dealers, or agents that, replied, "My object then and now and always has been to get business, the same as any other salesman."**

Scorer said that Baldwin told him that *his business was to sell typewriters, and to make any statement necessary to get a foothold;* and it is perfectly manifest that Scorer's statement in this regard is true. The object and purpose of the appellants, and the Remington-Sholes Company and their agents and dealers, in dangling Mr. Remington before the eyes of purchasers, and in stating and causing it to be believed that he had formerly been *connected* with the "Remington Typewriter" and the manufacture thereof, was to induce people, who were *pre-disposed* to purchase Remington machines (and there were many such) to take the so-called Remington-Sholes *as a Remington machine*, or a new and improved Remington. **It was an adroit scheme, and one well calculated to displace appellee's product.**

(2) **Alfred Stallwood** of Chicago, Ill., testified that he was a commission merchant doing business in that city, and that, at the time he gave his testimony, he had a *Remington* machine. It was the only writing machine in his office, and was obtained of the appellee about two weeks before he gave his evidence. Prior to that time he had a *Remington-Sholes* machine, which was at his office about five months on a monthly rental of $4.00 per month. At the time the Remington-Sholes typewriter was obtained, his business was conducted under the firm name of *Bartelme & Stallwood.* Bartelme died on the 18th of March, 1899, and Stallwood conducted the business under the same name up to Nov. 1,

1899, and thereafter under the name of Stallwood & Co. Stallwood said that he ordered the Remington-Sholes machine for the firm of Bartelme & Stallwood, at an office on the second floor of the building on the corner of State and Madison Streets. He saw a number of typewriting machines there. *He got the address from the telephone book or directory at his store.* It was the regular telephone book in use. *At the time he rented the Remington-Sholes machine, he did not know from actual experience of the typewriting machine, which was designated or termed Remington, or Remington typewriter, and his only knowledge thereof was from seeing the machine advertised so much, and he got it into his head that this machine must be all right. At the time he rented this Remington-Sholes machine, he intended to obtain a Remington typewriter, but the machine which he did obtain was the Remington-Sholes.* He said that when he consulted the city directory *and saw the name Remington, he did not look any further.* He did not examine the machine, which he saw in the salesroom, *and received no circulars or catalogues or business cards at the time.* The rental receipts and correspondence about it were signed by his bookkeeper. He first examined the machine after seeing it in his office. There was no cover with it. *He did not operate the machine himself and said his first information that it was not the Remington machine, manufactured by appellee, was from his stenographer, who told him that the machine he had was not the regular Remington.* This conversation was a week or two after the machine was received.

R., pp. 482, 487.

It is plain that when Stallwood rented and received this machine, he took it, *believing* that it was a *Remington* typewriter, manufactured by appellee, *and this belief was caused by his having seen the machine advertised so much, and having heard of it, and learned that it bore a high reputation among purchasers and users of typewriters.*

Manifestly he did not know, and did not suppose that there was more than one machine on the market which bore the name "Remington," or that there was more than one concern using that name in connection with the typewriter business. Stallwood was misled in consequence of the use of the name "Remington," by the Remington-Sholes Company, as a part of its corporate name, and upon and in connection with its product.

Even his stenographer only knew that it was not "the *regular* Remington." That is, the model or type of machine which she had been accustomed to see.

It was not necessary that Stallwood should know the name of the manufacturer who used the designation "Remington" for its machines. When the appellants rented him a machine bearing the name "Remington," they represented to him in effect that it was of that manufacture known as the "Remington typewriter."

Powell *v.* Birmingham, V. B. Co., Ld., (1897) App. Cas., 715.

(3) **Weingart Sale.** Another person who obtained a Remington-Sholes machine of appellants, *believing and supposing that it was manufactured by appellee, and was the Remington typewriter, was* **Samuel Weingart,** who was and is the principal of a large and flourishing private school in the Borough of Manhattan, City of New York. In June, 1898, Prof. Weingart bought a writing machine of **Page, Dennis & Co.,** who were the local agents of the appellants, their store and place of business then being at No. 341 Broadway, Borough of Manhattan, New York City. Weingart said that *he had intended buying a Remington typewriter for a long time.* He bought a scale of the Howe Scale Company, and *his attention was called to a sign in that store of The Remington Typewriter Company.* He asked how much a Remington typewriter was worth, and they told him $100. He says he asked

them whether they would give him a discount, as he was the *principal* of a school, and the salesman answered that he would give him the regular discount in such cases, which was 35 per cent. He sent his check to appellants for $65.00 on June 29th, 1898, and the machine was shipped to him. *He testified that the sign displayed in the store bearing the name "Remington" was what attracted his attention.* **That he asked them whether they sold the Remington typewriter, and they said yes. He was positive that he had bought a Remington typewriter, and rested in that belief until a few weeks after, when a friend of his wanted to write on the machine, who owned a Remington, and told him that his machine was different from his, whereupon he came to the conclusion that he had a different instrument, although he did not know at that time that he had bought from a different concern. At the time he purchased this machine of Page, Dennis & Co. he believed that he was purchasing and obtaining the old and well-known Remington typewriter, such as had been known for many years in the market.**

In cross-examination, he stated that he called at the office of the Howe Scale Company (Page, Dennis & Co.), twice before purchasing the machine. *He did not receive any catalogue*, and before purchasing a machine, from the Howe Scale Company, went to the Smith Premier typewriter office, a few doors away, and when he found that their price for a typewriter was the same, he went back the next day to the **"Remington people"** and asked them for a discount, and when they granted it to him, he told them he would send them a check for $65.00, and that upon receipt of the check they should send him the typewriter to his summer place in Ulster County, New York. *He had never seen any of the typewriters before, and relied upon the name* **"Remington."** *He did not know the makers of the*

Remington machine. He had heard the Remington typewriter talked about, and had seen it advertised. All he noticed on the sign was Remington Typewriter Company. He did not notice the word "Sholes" on the sign, and this would not have made any difference in his mind, as he was not aware that there was more than one company using the name Remington. He did not recall that there was any name or manufacturer's address upon the machine, and no cover was furnished with the machine. He did not recall that the name Remington-Shoes Company, Chicago, Ill., was on the front bar of the machine. But even if it was there, *so long as the name Remington was on the machine, he was satisfied.* He did not recall the fact that the name or word "Sholes" was mentioned, and did not remember having seen it, before the date of his testimony, in connection with a typewriting machine. **When he was dealing with the Howe Scale Company he was under the impression that they were selling the Remington typewriter, and continued under that impression until about three weeks after the machine was in his possession, and then even, he did not know that the machine he had purchased was of a different concern, although he then knew that it was a different make from that of his friend, who owned a Remington typewriter.**

He was only told the truth when he came back to the city in the fall of 1898. He said if he had been told by the young man in the Howe Scale Company's office that they were selling *the Remington-Sholes typewriter*, and had seen a sign bearing the name Remington-Sholes typewriter, *it would have made no difference to him, as he would have thought it a certain kind of Remington machine made by the Remington people. He did not know the full name of the company, or the place where the machines were manufactured.* He testified that if anybody had asked him after he had bought the machine whether he had ever heard the

name "Remington-Sholes" before that, he would have said no.

He further testified that *the sign may have contained the name "Sholes" attached to the name Remington, but it made no impression upon him.* The conversation, on the occasion of his first visit to the Howe Scale Company office, lasted not more than five or ten minutes.

He told the *salesman*, he was anxious to buy a typewriter, *and asked him whether they had the Remington typewriter.* He gave his check payable to Page, Dennis & Company, dated June 29, 1898. He had been principal of his school since 1874; a day and boarding school, of which he was the proprietor. His school had numbered for the last ten years from 110 to 140 pupils.

R. pp. 510-518.

On cross-examination in rebuttal, Weingart stated that *he had never seen the name Sholes* prior to the purchase of the Rem-Sho typewriter. He went to the Howe Scale Company's store to buy a scale, and noticed a sign that the *Remington* typewriter was sold in that store. *He asked the salesman who sold him the scale whether they sold any Remington typewriters. He said yes and introduced him to a gentleman on the other side of the store.* The name *Remington* must have drawn his attention, otherwise he would not have thought of buying a machine in a store which he entered for the purpose of buying a scale. His attention being called to "Defendant's Exhibit Rem-Sho sign from the office of Page, Dennis & Co.," he stated that **if he had seen the sign shown to him, he would have believed that a Remington typewriter was manufactured by a firm which called itself the Remington-Sholes Company, because he never knew who the manufacturers of the Remington typewriters were, nor where their factories were located, nor who their agents were.** He had seen a sign,

but did not know whether it was the one shown him or not. The sign shown him reads:

"REM-SHO TYPEWRITER,
Manufactured by
THE REMINGTON-SHOLES CO.,
Chicago, Ill."

He did not know whether the sign contained the name "Rem-Sho," *but it must have contained the name "Remington," which was the only thing that attracted his attention.* The sign was located on the right-hand side of the store as he entered, on the wall between the office of the gentleman to whom he was introduced and the store window. He remembered the sign was a large one, and that it was upon the wall over that part of the store in which the "Rem-Sho" typewriters were sold. He did not remember whether the name "Sholes" was on the sign.

If the name "Rem-Sho" was used in the conversation with the agent, he took it for Remington, but did not remember having heard the word "Rem-Sho" until long after he had purchased the machine. **He never knew that there was more than one kind of Remington typewriter, and when he saw the name "Remington," or "Manufactured by Remington," he only asked the price, and if the salesman used the word Rem-Sho, or Remington-Sholes, he thought it was one of the kinds of machines the Remingtons manufactured.** He did not remember the name "Sho." To the best of his recollection he never heard the name "Sholes" until some time after he bought the "Rem-Sho" typewriter. He did not know whether he saw "Defendant's Exhibit Page, Dennis & Co. Card," before or after the purchase, *but anyhow it would not have impressed him otherwise than that Page, Dennis & Co. were the representatives of the Remington typewriter.*

He did not remember to have received any "Rem-Sho" *catalogue*, like Defendant's Exhibit Rem-Sho catalogues Nos. 2 and 3. He was at their store twice; did not remember whether he spoke on both occasions to the same man. Being asked how he happened to go to the Howe Scale Company in the first instance, he said it was a few days before he went to the country, and he visited several stores to buy a large scale, and among others the store of the Howe Scale Company. The only other typewriter store, he noticed, was the Smith Premier, and he went there to enquire the price of their typewriters. He did not ask for the address of the Remington typewriter.

R., pp. 642–648.

The foregoing is the substance of Prof. Weingart's testimony, and it shows that *he was actually misled, and purchased a Remington-Sholes machine of appellants and for the Remington typewriter.*

In reply to the evidence of Prof. Weingart, defendants examined as witnesses **Hamlin E. Hatch** and **Thomas O. Parker.**

Hatch testified that he called at Weingart's School before June 22, 1898. He saw Weingart, and in reply to a question as to what occurred at the time of the call he said: "As near as I remember I introduced myself by handing him my card. I did not have any lengthy conversation with him."

R., pp. 1054–1055.

According to Parker's evidence, Hatch's visit must have occurred after the first visit of Weingart and before the second one.

R., p. 1280.

Weingart testified in rebuttal, that he did not remember any interview with Hatch. He had no recollection that Hatch called at his school, or handed him, or sent in his card; but said *that a*

great many agents handed in their cards to him which he never examined.

R., p. 641.

Obviously the visit of Hatch, if any, to Weingart's school, *made no impression on the Professor's mind*, and there was nothing in the incident, or in his presentation of the card, which in any way suggested to him, or indicated to him, that the writing machine, which he afterwards purchased, was not the *Remington* typewriter manufactured by appellee.

Parker's testimony shows that there were signs displayed in the office of Page, Dennis & Co., No. 341 Broadway, containing the words "Remington-Sholes Company," and it also appears that the words "**Remington-Sholes Typewriters**"—not "Rem-Sho"—were displayed upon one or more of the *front* windows of the store.

In his direct examination, **Parker testified that Weingart asked him "if he had a Remington machine."**

R., p. 1282.

In cross-examination he testified, **"I do not recall having sold any one save Mr. Weingart, who came in and seemed to have an intention of buying a Remington machine.** * * * In my reference to Mr. Weingart, when I said he seemed to have an intention of buying a Remington machine, *I meant that he inquired for the Remington machine as stated in my direct examination.* * * * When I said that I endeavored to sell every man that came in there inquiring for typewriters irrespective of make, *I intended to convey the idea that the inquiries for Remington Standard machines were included in this number.* * * * *I do not think I said that I sent all parties who inquired about Remington machines to the Remington office.* I think I said parties who inquired for the Remington *office.* Whenever it was asked me where the

Remington could be bought, I gave the desired information, that is I told them where the Remington *office* was located. * * * **Yes; I tried to sell anybody who came in a Rem-Sho machine**; if I could not sell these parties, I would not withold from them any information in regards to the Remington, or the location of the Remington office."

R., p. 1288.

In direct examination, Parker was interrogated and answered as follows:

Q. 45. Do you recall whether or not you told Mr. Weingart where or by whom the Remington Standard machine was being sold? A. I do not recall that, but I know I told lots of people who came there inquiring about the Remington machine and where it was sold, just where their office was.

R., p. 1283.

From Parker's evidence it will be seen that Weingart had the intention of buying a Remington machine, and that he asked Parker if they had a Remington machine, and that Parker endeavored to sell everybody a typewriter who came into the store of appellant. He admitted that he had no recollection of telling *Weingart where the Remington office was*, and that he did not send *all* parties who inquired about *Remington machines* to the Remington *office*. It was *only* when they inquired for the Remington *office*, that he sent them, *in case he could not sell them a Rem-Sho.* It is, therefore, plain *that Weingart desired and intended to purchase appellee's writing machine, and that Parker desired to sell him the Remington-Sholes writing machine. So much is clear.*

Weingart said that he not only intended to buy the Remington typewriter, but supposed that he had purchased that machine, until he was informed to the contrary several weeks after he purchased the Remington-Sholes Typewriter.

Parker alleges that he explained the machine to Weingart in detail, on the occasion of his first visit, showing him the No. 2 and No. 3 "Rem-Sho" typewriters. He testified that Weingart visited the office of appellants twice, and that on the occasion of his second visit he gave the order for a machine. He asserted that in answer to Weingart's question as to whether they had a *Remington* machine, he told him no, but they had a better machine, one which combined the best qualities of the Remington with those of the Smith Premier, and explained the difference between appellants' machine and the Remington. This is in substance his statement of the transaction.

R., pp. 1279, 1280.

According to Parker's testimony he must have made the *usual* statement to Weingart *that Mr. Franklin Remington was the son of the man who first manufactured the old Remington machine*, for he testified: "I don't think I ever sold a machine to a party to whom I did not state that the manager of our company, Mr. Franklin Remington, was the son of the man who first manufactured the old Remington machine, and that our Mr. Sholes was the son of the inventor of the old Remington. * *"

In the light of this testimony, it is very clear that Weingart heard a great deal from **Parker** about **"the old Remington machine,"** at the time he obtained the Remington-Sholes typewriter.

Prof. Weingart was called in rebuttal on behalf of appellee, and denied the statement of Parker to the effect that he told Weingart that they did not sell the Remington machine, but that they had a better one, etc.

R., pp. 641, 642.

Weingart testified that a salesman in the store told him they sold Remington typewriters.

There is no doubt about the fact that Weingart was misled and deceived, and purchased the

Remington-Sholes Typewriter as and for the Remington manufactured by appellee. Neither Weingart nor Stallwood had ever before owned a typewriting machine of any kind, and neither of them were operators thereof. *Both of them had seen advertisements of the Remington machine and heard much about it; knew its reputation in the market, and among purchasers and users of writing machines, and like most purchasers were unacquainted with the physical characteristics of the machine, and its appearance and the details of its structure.* They only knew the complainants' product by **reputation,** and by "**catch words easily retained in the memory**" — "**Remington Typewriter**" — **and believed it to be the product of Appellee—the "Remington Typewriter Company."**

It was the names "Remington" and "Remington Typewriter Company," which were present in the minds of Stallwood and Weingart when they obtained their writing machines, and the name "Sholes," having no repute in the trade, made no impression on their minds.

Weingart testified that he never knew that there was more than one kind of Remington typewriters, and when he saw the name Remington and manufactured by the Remington Company, he was satisfied and only asked for the price; that if the salesman used the word "Rem-Sho," or "Remington Sholes"—and he was quite positive the salesman did not—*he would have thought it was one of the kinds of machines the Remingtons manufactured.* In other words it would have indicated Remington connection to him and implied the original manufacture. It suggested to Stallwood and Weingart that the machine "had been made by the Remington concern, whose name was a 'by-word for good workmanship the world over.'" It is plain that the name "Sholes," which was used in connection with the name Remington, both in the corporate name and in the designation of the machine, did

not disturb or displace the belief, in the minds of Stallwood and of Weingart, that the machines, which they obtained, were *Remington* typewriters manufactured by appellee. **That which was most salient was fixed in their minds, and they did not go into the minuter refinements of the names and words upon the signs or machines.**

In Walter Baker & Co., Ltd., *v.* Saunders (80 Fed. Rep., 889, 894), the Court observed that: "As was said in the quotation *supra*, complainant's goods had become well known as 'Baker's Chocolate,' and when Baker's Chocolate was called for, it was understood to be Walter Baker's Chocolate that was intended. *The public do not go into the minuter refinements of the title or the label.* Whether it is described as 'Walter Baker's Chocolate,' or 'Wm. Baker's Chocolate,' or 'W. H. Baker's Chocolate,' or 'W. H. Baker's Best Chocolate,' *so long as the title contains the words which in trade and among consumers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's.* * * *"

To the same effect:

> Johnson & Johnson *v.* Bauer & Black, 82 Fed. Rep., 662, 663; Read *v.* Richardson, 45 L. T. N. S., 54; Cox's Manual, No. 698; Saxlehner *v.* Eisner etc., Co., 179 U. S., 19, 33.

In Wotherspoon *v.* Currie, 22 L. T. N. S., Malins, V. C., said: "Whatever words or description he (Deft.) used on his labels, he should not have used the one word which would prove injurious to the plaintiffs."

The name "Remington" had become the trade denomination of appellee's machines long before appellants' machines were put upon the market, and it was not necessary that Weingart or Stall wood should know the name of appellee because

the designation "Remington Typewriter" meant to the public the manufacture of appellee.

Powell *v.* Brewery Co., Ld. (1897), App. Cas., 715.
Menendez *v.* Holt. 128 U. S., 514, 521.

As said above, Stallwood and Weingart belonged to that large class of purchasers, *who are not operators of typewriting machines, and are not familiar with the physical characteristics or appearance, or the details of construction of writing machines, but know the trade name and reputation of appellee's typewriters.* That there is a *large class* of such purchasers was clearly proven in this case.

R., pp. 448, 449, 451, 454, 543, 544, 549, 550, 606, 607.

This *large* class of customers instinctively think of the "Remington," when the subject of writing machines is mentioned, and we have hitherto shown that *the good will associated with that name is a very important factor in the sale of a typewriter.*

The appellee's machine becoming widely known as the "Remington," and its business as that of the "Remington Typewriter Company," it is perfectly obvious that any *new* concern coming into the market, *and designating its business and product either wholly, or in part, by the name Remington,* would most certainly *mislead and deceive purchasers* of the class above mentioned.

In American & English Encyclopedia of Law, Vol. 26, p. 416, it is said that "the imitation of a name by which goods are known is frequently the most dangerous form of imitation, for the reason that purchasers may be misled who are entirely unfamiliar with the genuine goods, but who have only seen the name advertised, or have been told of the goods by their name by others and asked for them by name, without ever having seen them. The purchaser, under

these circumstances, is much more liable to be misled and to accept the goods of an imitator for those of the owner of the trade name, than where familiarity with the goods is necessary."

This was the case with Stallwood and Weingart, who were unfamiliar with the appellee's machines, but had seen the name—"Remington Typewriter" —advertised, or had been told of appellee's machines by their trade designation by others; and hence, when they saw the name "Remington" upon appellants' machines, and upon its signs, etc., they believed the machines, obtained, were the *genuine* article, *and the title containing the word which, in trade and among purchasers had come to be the every day designation of appellee's machines, they naturally assumed such machines to be of appellee's manufacture.*

In this connection the words of the Circuit Court of Appeals of the 7th Circuit, quoted with approval in **Johnson & Johnson** vs. **Bauer & Black,** 82 Fed. Rep., 663, are of force and pertinent. Judge Jenkins writing said: "A specific article of approved excellence *comes to be known by certain catch-words easily retained in memory; or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect, he acts upon the moment. He is without comparison. It is only when the difference is so gross that no sensible man acting on the instant would be deceived that it can be said that the purchaser ought not to be protected from imposition.* Indeed some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, *the imitation need only be slight if it attaches to what is most salient, for the usual inattention*

of the purchaser renders a good-will precarious if exposed to imposition."

The conditions, under which purchasers ordinarily purchase, and the care which they exercise in the purchasing of typewriting machines is clearly set forth in the testimony of the appellee's witnesses last above cited. *It there appears that to a very large extent, purchasers do not personally operate the machines*, and that it is the *exception* when the buyer of a typewriter possesses any information in respect to the *details* of the machines. The ordinary buyer purchases upon the *reputation* of the machine, and relies upon the *trade-name* or designation associated with it.

Ordinary purchasers include incautious, unwary, and ignorant purchasers.

McLean *v.* Fleming, 96 U. S., 245, 256.
Celluloid M. Co. *v.* Cellonite M. Co., 32 Fed. Rep., 92, 97.
Bissell, etc., Works *v.* Bissell, etc., Co., 121 Fed. Rep., 366.

It has frequently been held that the *ignorant* and *unwary* purchaser is as much entitled to protection as the sharp and shrewd one.

Von Mumm *v.* Frash, 56 Fed. Rep., 830, 839; McLean *v.* Fleming, 96 U. S., 256; Coleman *v.* Crump, 70 N. Y., 573, 578.
Glenny *v.* Smith 11, Jur. (N. S.), 964.
Wetherspoon *v.* Currie, L. R. 5, H. L., 508 (1872).
Singer M'f'g Co. *v.* Loog, 8 App. Cas., 18 (1882).

Counsel for appellants *admitted*, in the court below, that "Weingart may have been mistaken," but contended that he was not deceived. Counsel also said that "It may be urged, however, that even if he was not deceived, still his purchase of the Rem-Sho machine upon the supposition that it was complain-

ants' indicates a tendency toward confusion in the trade. The conclusive answer to such contention is *first*, that if the Remington-Sholes Company rightfully used upon its signs the words 'Manufactured by the Remington-Sholes Company, Chicago, Ill.,' no ground of complaint exists."

If "Weingart may have been mistaken," as *admitted*, it follows that he may have been *misled* and may have taken appellants' machine as and for the "Remington" typewriter. Weingart says he purchased the appellants' machine supposing it to be the production of appellee. *was misled*, and deceived by seeing the name Remington prominently displayed in the Defendant's store and was told by a salesman therein that they sold Remington typewriters. In respect of appellants' alleged *conclusive* answer that *if* the appellants *rightfully* used the words, "Manufactured by the Remington-Sholes Company of Chicago, Ill.," upon their signs, etc., then no ground of complaint existed, it is to be noted that those were not the *only* words which the appellants used upon their signs and machines, and in connection with their business. Appellants *admitted* that they used the words "Remington-Sholes" as well as the abbreviation "Rem-Sho" upon their machines and as designations therefor, and that the words "Remington-Sholes Typewriters" were painted upon the windows and signs of their store, No. 341 Broadway, where Weingart purchased his machine.

In the sale-slip of the Weingart machine, the *full* name and not the *abbreviated* one was used, to wit: "Remington-Sholes Typewriter."

R., p. 1460.

It is plain, therefore, that the name "Remington" was *prominently* put forward in appellants' store, *so as to be likely to catch the eye of Weingart and to remain in his memory*. He *wanted* appellee's machine, the *distinctive* name of which was and is "Remington"; and with this name in his

eye and mind he did not go into *details*, and was not required to do so. Appellants then used this distinctive name upon their signs and machines.

Says Kerly in his work on Trade-marks, p. 491:

"Only things which are put prominently forward so as to be likely to catch the eye of the purchaser and remain in his mind need generally be considered."

Similarity in the main distinguishing feature is generally sufficient to constitute infringement or unfair competition. Wortherspoon *v.* Currie, L. R. H. L. 508; Saxlehner *v.* Eisner, etc. Co., 179 U. S. 19, 33.

Appellants' signs, etc., displayed the words "Remington-Sholes Typewriters," which as already said, and as found by the court below, *indicated Remington connection in typewriter production, and implied the original manufacture.*

Weingart testified in substance that the sign shown to him, and which he did not recollect, would have caused him to believe that a *Remington* typewriter was manufactured by a firm calling itself the Remington-Sholes Company, and that if the *salesman* used the designation "Rem-Sho," or "Remington Sholes" *he thought it was one of the kinds of machines the Remingtons manufactured.*

In respect of the appellants' contention that Weingart did not use ordinary care and caution in the purchase of his machine, it is to be noted that he was one of *a large class of purchasers* who only know appellee's machine by its *reputation and its trade-name*, "*Remington*," and are not familiar with the *physical* characteristics and *details* of construction of the machines. Moreover, prior to the time when appellants entered the typewriter field, the public and purchasers and users of machines had come to know, or to believe the fact, that there was but *one concern* that manufactured and sold a writing-machine bearing the name "Remington." Weingart testified that he never knew that there

was more than one concern selling it. Under these circumstances it was *inevitable* that the names employed by the appellants upon and in connection with the sale of their machines, should be understood by Weingart, and any ordinary unsuspecting purchaser, to indicate appellee's product.

Weingart was only required to use such care as persons ordinarily exercise in the purchase of typewriters under like circumstances. He was not bound to study or reflect. He was without the opportunity of comparison, and had a right to rely upon the name "Remington," which was the *salient* and *dominant* feature in the name of appellant's machine, as implying and indicating the *original* manufacture.

Pillsbury *v.* Flour Mills Co., 64 Fed. Rep., 841, 847.

Powell *v.* B. V. Brewery Co., Ld. (1897), App. Cas., 715.

INFRINGEMENT.

The Howe Scale Co. and Remington-Sholes Company—Fay-Sholes Co.—by the use of the names and designations, Remington-Sholes Company, Remington-Sholes and Rem-Sho in their business and in their advertising media and upon their machines, inaugurated an unfair and inequitable competition and thereby invaded the rights of appellee.

In the consideration of this branch of the case, we may lay out of sight the suggestion that the name "Remington" is the name of one of the *incorporators* of the Remington-Sholes Typewriter Company and the Remington-Sholes Company, for it has already been shown that this case is to be considered and determined to all intents and purposes, the same as if no one born into the name of Rem-

ington was connected with the *artificial* person, the Remington-Sholes Company.

> R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 66 Fed. Rep., 56; S. C., Fed. Rep., 1017; Pillsbury *v.* Pilsbury, etc., Co., 64 Fed. Rep., 841; Garrett & Co. *v.* Garrett, 78 Fed. Rep., 477; Brinsmeed *v.* Brinsmeed, L. R. (1897), 1 Ch., 46; Valentine Meat Juice Co. *v.* Valentine Extract Co., Ld. and others, 1901, 17 Pat. Rep., 673; Peck Bros. & Co. *v.* Peck Bros. Co., 113 Fed. Rep., 291, 302; Bissell, etc., Works *v.* Bissell, etc., Co., 121 Fed. Rep., 357, 367.

In the case at bar, the Court of Appeals speaking through Judge Lacombe, said:

"In the case of a corporation, however, the situation is different. The choice of its name is voluntary; such name is an artificial thing which can be selected by its incorporators from the entire vocabulary of names. In *R. W. Rogers Co.* v. *Wm. Rogers Man Co*, 70 F. R., 1019 this Court enunciated the proposition that "a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such name has been intentionally selected in order to compete with an established concern of the same name engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. * * * The corporators chose the name unnecessarily, and, having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant. Other Courts have laid down substantially the same doctrine—*Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y., 462; *De Long* v. *De Long Co.*, 89 Hun, 399; *Garret* v.

T. H. Garrett & Co., 78 F. R., 472; *LePage Co.* v. *Russia Cement Co.*, 51 F. R., 941; *Clark Thread Co.* v. *Armitage*, 67 F. R., 896; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 17 Patent & Trade Mark cases, 673. Moreover, the incorporator who elects to transfer his own name for business purposes to an artificial person other than himself is taking an affirmative step in the direction of promoting unnecessary confusion, instead of taking precautions to prevent it."

It will be observed that the excerpt quoted by the learned Judge, from the Rogers Case, is found in the opinion of Judge Wallace in that case.

Moreover, as against the appellants the right of appellee to be protected in the use of the name "Remington" is generic. There is no "state of the art," if the common law does not exclude that expression. Appellee's right is generic as in the case of "Higgins' Soap," "Baker's Chocolate," "Heinisch's Shears," "Mumm's Champagne," "The Delineator," "Valentine's Meat Juice," "Clark's Spool Cotton," "Garrett's Snuff" and other instances which are the subject of authoritative adjudication.

> Charles S. Higgins *v.* Higgins Soap Co., 144 N. Y., 463; Walter Baker & Co., Ld. *v.* Saunders, 80 Fed. Rep., 889; P. Heinisch's Sons *v.* Boker, 86 Fed. Rep., 765; Von Mumm *v.* Whittemann, 85 Fed. Rep., 966; Butterick Co. *v.* Standard Fashion Co., N. Y. S. C. (reported in New York Law Journal March 21, 1898); Valentine Meat Juice Co. *v.* Valentine Extract Co., Ld. *supra;* Clark Thread Co. *v.* Armitage, 78 Fed. Rep., 936.
>
> Garrett *v.* Garrett & Co., 78 Fed. Rep., 472, 475, 479.

In all these cases, and others which are not less in point, the decision depended upon the proposition

that the complainant was entitled to be protected in a broadly inclusive use of the name which it sought to protect and the good will which the name symbolized. *The appellee's right to the use of the designation "Remington," being generic and exclusive as against appellants, it is axiomatically plain that the specific or qualified use of the designation, Remington-Sholes, constituted an infringement of appellee's rights.*

In its answer in this case, the Howe Scale Co. alleges that prior to and up to the year 1897, the writing machines manufactured by the Remington-Sholes Company, *and by Fay while he was Trustee*, were designated and marked "Remington-Sholes."

R., p. 23.

Its principal's predecessor, which manufactured the machines, was styled the "Remington-Sholes Typewriter Company."

R., pp. 21, 22.

On the *Re-organization* of the business of the so-called Remington-Sholes Typewriter Company, in 1897, the word "Typewriter" was dropped from its *corporate* title, and the name "Remington Sholes Company" was taken.

R., p. 24.

This slight change in the corporate title was of no consequence, in so far as the public was concerned, and for the purposes of this case, it may be regarded the same as if the word "typewriter" were written into the corporate name and its designation were "Remington-Sholes Typewriter Company."

Higgins Co. *v.* Higgins Soap Co., 144 N. Y., 462, 471.

USE OF ABBREVIATED NAME.

In 1897, after the Remington-Sholes Company was organized, it used the *abbreviated name* "*Rem-Sho*" in connection with its machine, and in its advertising media, but in all cases the corporate designation, "Remington-Sholes Company," was *inseparably associated with, and used in connection with this abbreviated name, and showed that it was an abbreiation of* "*Remington-Sholes.*" That is a shortened form of that hyphenated name, obtained by the omission of syllables from the end of the words.

R., pp. 1031, 1032, 1082, 1093, 1097, 1104, 1114, 1124, 1162, 1163, 1181, 1182, 1189, 1193, 1248, 1249, 1250, 1255, 1256, 1276, 1278. See also 1445; Bouvier's Law Dic., p. 9.

The *abbreviation* "Rem-Sho" was first used as a *telegraphic code address* by the "Remington-Sholes Typewriter Company," in or about August, 1895, and such use was continued until July, 1897. After that time it is alleged to have been used in connection with the machines of Remington-Sholes Co.

R., pp. 1352, 1353.

The term "Rem-Sho" was used *as a mere abbreviation* of the name "Remington-Sholes," and was so understood by the public, and by purchasers and users of typewriting machines.

R., pp. 1044, 1081, 1093, 1124, 1212, 1219, 1220, 1225, 1230, 1236, 1240, 1258, 1333. R., pp. 524, 530, 564.

Appellants agents and dealers designated the machines as the "Remington-Sholes,"

R., pp. 882, 883, 884, 885, 893, 896, 898, 978, 979, 983, 986. R., pp. 1460, 1464, 1465.

Appellants witnesses admit that it was often designated the "Remington-Sholes," or "Remington-Sholes Typewriter."

R., pp. 1044, 1064, 1096, 1117, 1127, 1134, 1213, 1220, 1252, 1256, 1261, 1270, 1272, 1273, 1307.

The *answer* of the appellant, Howe Scale Co., is *conclusive* of the question now under discussion, and we quote therefrom, as follows:

"But respondent admits that said Remington-Sholes Company and this respondent have advertised the typewriter manufactured by said Remington-Sholes Company and sold by this respondent as its agent, as 'Remington-Sholes' typewriters and as 'Rem-Sho' typewriters, as they had a lawful right to do. * * *"

R., pp. 27, fol. 81.

From this admission it is manifest that the writing machines manufactured by the Remington-Sholes Company, and sold by the agent, Howe Scale Company, had been advertised and made known to the public both as "*Remington-Sholes*" typewriters, and as "Rem-Sho" typewriters. That is to say, those designations hadbeen used *synonymously*, and it was, therefore, of no sort of consequence which was used, since it was known to the public that "Rem-Sho" *was merely an abbreviated or shortened form* of the hyphenated name "Remington-Sholes."

Inasmuch as these terms were used *synonymously* for the purpose of reaching a conclusion in respect of *infringement*, we may *disregard the abbreviated term "Rem-Sho,"* and direct the attention of the Court, mainly, to the words or designation, "Remington-Sholes."

Postulating that the name *Remington* is lawfully and *generically appellee's trade-name and trade-mark and points to and indicates its business and product*, the question presented is whether or no

the means employed by the appellants and the designations used by them exposed the ordinary unwary purchaser to mistake appellants' machines for appellee's. Whether they tended to divert from appellee and attract to the appellants, the legitimate trade that belonged to the former, and whether the use of the name "Remington-Sholes" as it was employed, was not an unlawful invasion of the rights of appellee and calculated to injure its business.

Pilsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 Fed. Rep., 841, 846.

It has hitherto been shown that the designation used by the appellants and by their agents and dealers was calculated not only to mislead the unwary or unsuspecting purchaser to mistake appellants' machines for appellee's, but that it actually did mislead ordinary purchasers, obtaining or purchasing typewriting machines in the circumstances and under the conditions which generally prevail in the typewriter trade. Moreover, *it is never to be forgotten*, in this case, that from the beginning appellants knew and proceeded upon the assumption that the use of the name "Remington-Sholes," both in the *corporate* name of the Remington-Sholes Co., and upon its machines, *was of doubtful propriety*, and that they had sought to escape liability for infringement by cautioning their agents and dealers not to confuse their corporate name and machines with appellee's business and product, and to take care that purchasers should not be misled, *thereby admitting that purchasers were liable to be misled in the premises.*

On appellants' own admissions, statements and conduct, and that of their agents and dealers, we submit that the *corporate* name, "Remington-Sholes Company," and the *designations*, "Remington-Sholes," and "Rem-Sho" used in connection with appellants' machines, were calculated to create *confusion* in business and to *mislead* purchasers of writing machines to the injury of appellee.

Appellee's witness, **Platt,** who had an extensive observation and experience in the sale of appellants' machines, found that the names "Remington-Sholes," and "Rem-Sho," *created in the minds of the public a decided impression that it was a Remington machine and was the product of appellee.*

R., pp. 145, 146, 147.

F. Lyman Brown, a dealer in typewriters, of large experience, stated that the "Remington-Sholes" typewriter could readily be palmed off as and for the complainant's machine to persons not knowing the difference between the "Remington" and other makes.

R., pp. 448, 449.

Appellee's witness, **Crandall,** said that it was the *exception* that the *buyer* of a typewriter possessed any information *in detail* whatever of the machine. He scarcely had more than a very general idea of the form of a writing machine. That it was the *rule* in the *larger cities* that the *business-man* did not examine the typewriter he bought.

R., p. 544.

Crean said: "It is an exceedingly *unusual* thing for the *purchaser* of a typewriter to inquire to any great extent into its *mechanical* construction. They are often guided very largely by a preference which they have for certain makes of writing machines, and I should say that the *name* of the machine *and the reputation which that name carries with it,* is what influences *most purchasers* toward a particular machine.' '

R., p. 594.

To the same effect is the evidence of appellee's witness, **McClain,** pp. 606, 607.

It will thus be seen, from the evidence of the witnesses above referred to, and from that of others in the Record to the same effect, *under what circum-*

stances and conditions writing machines are bought and sold, and the class of persons who purchase them. Now the rule is well settled that the purchaser is required only to use that care which persons ordinarily exercise under like circumstances, **and that "the imitation need only be slight if it attaches to what is most salient; for the usual inattention of a purchaser renders a good will precarious if exposed to imposition."**

Pillsbury *v.* Flour Mill's Co., *ubi supra.*
Stuart *v.* Stewart Co., 91 Fed. Rep., 245, 246.

It is perfectly plain that the designation "Remington-Sholes," employed by the appellants contained appellee's trade-name and designation, "Remington," *and that the name "Remington" is "what is most salient," in both trade designations. "The main idea left on the mind" of the prospective* purchaser was "*Remington*"—a name of world-wide repute.

Similarity, not identity, is the usual course when a party seeks to benefit himself by the good name of another.

Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep., 97.

In Carroll *v.* Ertheiler, 1 Fed. Rep., 688, the controversy was over the name "Lone Jack" as applied to smoking tobacco. Butler, *J.*, says (p. 691): "The defendant's application of this name to his smoking tobacco is an adoption and use of the **essential part** of the plaintiff's trade-mark."

"Surrounding it with a different device signifies nothing to the public, who attach no importance to the device of the plaintiff. The defendant's name upon the cigarette if recognized (and it would not be without close inspection), would not inform the public that the tobacco is not of the plaintiff's manufacture."

In Amoskeag Mfg. Co. *v.* Spear, 2d Sandf., 599 (a leading case in this country), Judge Duer, said (pp. 607, 608): "It is evident, however, that in order to convey a false impression to the mind of the public as to the true origin or manufacture of goods, it is not necessary that the imitation of an original trade-mark shall be exact or perfect. It may be limited and partial. It may embrace variations that a comparison with the original would instantly disclose, yet a resemblance may still exist that was designed to mislead the public, and the effect intended may have been produced * * * *. In an imitation of the original mark upon an article of goods of the same description, the name of the proprietor may be omitted. Another name, that of imitator himself, may be substituted, *but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded. Its object, we may be sure, was not to communicate the truth, but to escape the penalty of falsehood; a fraud is intended, an unlawful gain is meant to be realized, but it is believed or hoped that an injunction may be avoided and a claim for profits or damages be repelled.* The fraud, however, if a court of equity is true to its principles, will be suppressed and its fruits be intercepted or restored."

In Seixo *v.* Provozende, 1 Ch. App., 192, it was said by Lord Justice Brett, that "if the goods of a manufacturer have, from the mark or device he has used, *become known in the market by a particular name*, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

To the same effect:

Bissell, etc., *v.* Bissell, etc., 121 Fed. Rep., 366.

Furthermore, since appellants appropriated the material and essential part of appellee's trade-name and trade-mark, the burden is upon them to disprove the probability of deception, and not upon appellee to prove it.

Ford *v.* Foster, L. R. 7 Ch., 611; Orr-Ewing *v.* Johnston & Co., 13 Ch. D., 434; Sebastian on the Law of Trade-marks (4th Ed.), p. 124; Kerly on Trade-marks, pp. 372, 373.

Whether the trade-name and designation of the appellee be regarded as "Remington," or "Remington Standard," it is perfectly obvious that appellants' designation, "Remington-Sholes," contained the *essential and material part* of the appellee's trade-name, to wit: **"Remington."**

In the latter case we would have, for comparison,

REMINGTON STANDARD TYPEWRITER.
REMINGTON-SHOLES TYPEWRITER.

While these designations are not *identical* they are *similar*, and would be likely to mislead the ordinary purchaser of writing machines.

The name "Sholes" had no repute in the typewriter trade, or among purchasers and users of writing machines at the time it was selected by the Remington-Sholes Company and its predecessor, except and in so far as it had been previously associated with appellee's predecessor's machines. If it be asserted that it had repute in the trade, then the evidence in this case shows that such repute was due to association with appellee's predecessor's machines and business and rightfully belongs to appellee and not to appellants.

But the name "Remington" then was, and now is, *one of world-wide repute*, and was known to be of great value in the typewriter trade at the time it was selected, and the *persistency* with which appellants have clung to this name is persuasive evi-

dence of its importance and value, in the minds of appellants.

In collocating the designation Remington-Sholes, it will be observed *that the name "Remington" was placed first, and the word "Sholes" afterward;* that is to say, *that which was most salient and would first catch the eye and strike the ear was given precedence.* The reason therefor is obvious.

The evidence of appellee's witnesses, Stallwood and Weingart, and that of others, demonstrate the fact that *the name Remington was the salient and controlling word or factor used in appellants' corporate name and in connection with its product.* The statements of Fay to Browne and to Sholes, hitherto referred to, show that he regarded the word "*Remington*" as the *valuable part* of the hyphenated name. The name Remington at that time had been associated with appellee's business for many years, *and hundreds of thousands of dollars had been expended in advertising it and making it known in all parts of the civilized world,* while the name "Sholes" had not theretofore been employed, except for a short time at the inception of appellee's predecessor's business.

We have hitherto shown that appellee's right to the use of the designation Remington was and is exclusive, as against appellants, and it, therefore, follows that *the specific or qualified use of that designation constituted an infringement of appellee's rights.* In the present instance, there is no doubt that appellants' machine was a "Remington machine" of a particular kind. It was a machine of the *genus* "Remington," and of the *species* "Sholes." If *Sholes* had introduced a machine and designated it "Sholes-Remington," it is axiomatically plain that there would have been a right of action against him to restrain the use of the word "Remington" in connection with the word "Sholes." For the same reason, the use by the *artificial* person, "Remington-Sholes Company,"

of the designation "Remington-Sholes" was actionable.

This doctrine as to the right of a person who has popularized a name to be protected against its use, in connection with other words or names, is illustrated in many cases. The citation of a few authorities will suffice.

> Anheuser-Busch Brewing Assn. *v.* Piza, 24 Fed. Rep., 149. Congress, etc. Spring Co. *v.* High Rock, etc., Spring Co. 45 N. Y., 291. City of Carlsbad *v.* Kutnow. 71 Fed. Rep., 168. Apolinaris Co. *v.* Norrish, 33 L. T. N. S., 242. Cochrane *v.* MacNish, L. R. A. C., 231. Fuller *v.* Huff, 104 Fed. Rep., 141. Saxlehner *v.* Eisner, etc. Co., 179 U. S., 19, 33.

Appellants' use of the word "Remington" was more significant than if it had been preceded by the name Sholes in the possessive, so as to have read "Sholes-Remington." The word "Sholes" can be understood only as giving a specific meaning to the word which it qualifies. *To say that Sholes is the noun and Remington the adjective is to admit that there is an arbitrary, unnecessary and fraudulent use of the word Remington.* Obviously the name Remington was selected for the purpose of diverting and appropriating a portion of the good will associated with that name, *and thereby reaping a pecuniary profit, and not to give a distinctive individuality to the new machine.* The intent was to get the benefit of appellee's reputation which was then world-wide. The machine then had a name, to wit: **"The Z. G. Sholes,"** which was that of the inventor. But that was a *new* name in the typewriter trade, and to purchasers and users of writing machines. There was no good will or reputation associated with that name, and it would not attract the public. **With appellee's machine everywhere in use and known by the name Reming-**

ton, and with words beyond number from which to select, if the name "The Z. G. Sholes," already selected, was not satisfactory, the new aspirant for recognition singled out the name of the old machine and applied it to the new construction and made the old name a part of the corporate name of the new concern. In the language of Mr. Justice Bradley, hitherto quoted, "It will take a great deal of explanation to convince any man of ordinary business experience that this name was not adopted for the purpose of imitating that of the old successful company."

(32 Fed. Rep., 97.)

The case of Fuller *v.* Huff (104 Fed. Rep., 141) is in many respects closely analogous to the case at bar. In that action, Judge Shipmen speaking for the Circuit Court of Appeals said: "The question, therefore, is, is the *real* defendant's use (for it is manifest that the Michigan corporation is the real defendant) of the words 'Health Food Company,' in connection with the words used as a *prefix* and *suffix*, such a use as is likely to deceive consumers into the belief that they were buying the complainant's goods? It is to be observed that the frequent insignia of an intent to deceive, namely, the copy or the imitation, more or less close, of the dress of the competitor's packages, are absent in this case; but if a trade-name has been so identified with the business of a manufacturer as to inform the public that the name upon goods means that they are the product of that person and another subsequently adopts and displays the name, *it is not material that he has not also adopted the particular dress in which his predecessor has presented his goods.* Hier *v.* Abrahams, 82 N. Y., 519."

The learned Judge, after referring to the *long use* of the words "Health Food Company" by the plaintiff, and the subsequent adoption thereof in connection with *prefixes* and *suffixes* by the defend-

ant's principal, observes: "'The defendant now so coveted the name as to determine not to relinquish it, and continued its use despite remonstrance. The benefit to the corporation was derived from the familiarity with the name on the part of that portion of the public which used this class of goods. * * * *The question in this case is, however, whether the simple use of the name, although with prefixes or suffixes, is not 'likely to deceive purchasers.'* The history is significant in regard both to the motive of the Michigan corporation in retaining its occupancy of the name and the probable effect of a permanent retention. After it had presented its goods to the public for use under the name 'Sanitarium Foods' and 'Invalid foods,' *there was no necessity for an abandonment of the former names* under which it had confessedly obtained success and by which it was well and favorably known by its customers. The adherence to the new name to the extent of guarantying productions to its purchasers against suits, indicates the pecuniary benefit which was expected to ensue from the adoption of a name to which customers had long been accustomed, and the persistence in the use also indicates the pecuniary injury which was liable to come upon the complainant. The case is not one where the Michigan corporation must use to a certain extent the name of the complainant, and it is not, therefore, one of *damnum absque injuria.*

"It is the case of an *unnecessary* use of a name long previously used by another in the same business, and in the recent decisions, by courts of last resort, upon the right to the use of trade names, although geographical or descriptive in their primary meaning, great importance is given to mere long continued and exclusive priority of use. North Cheshire and M. Brewery Co. *v.* Manchester Brewery Co. *supra;* American Waltham Watch Co. *v.* United States Watch Co. *supra.* It was not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived,

for a manifest liability to deception exists. Taendsticksfabriks Akticbolagat Vulcan *v.* Myers, 139 N. Y., 364; 34 N. E., 904; Manufacturing Co. *v.* Trainer, 101 N. S., 61; 25 L. Ed., 993; Biscuit Co. *v.* Baker (C. C.), 95 Fed., 135. Although the intent of the defendant's principal when it commenced to use the name 'Health Food' may have been innocent, the continuance after it had learned of the complainant's prior use, indicates its deliberate intention to use the name without reference to the complainant's prior rights. Orr *v.* Johnston 13 Ch. Div., 434."

In the case at bar appellee and its predecessors had used the name "Remington" and "Remington Typewriter," etc., for many years before the Remington-Sholes Typewriter Co. assumed it; had acquired an extensive business under it; had established agencies for their machines in all the principal cities and towns of the United States and in nearly all other parts of the civilized world. In fine appellee and its machine had acquired a world-wide reputation. The model machine of appellants' was named for the inventor thereof—"**The Z. G. Sholes**"—which was the *natural* and an appropriate name for the machine. A company was, also, organized under the name, **The Z. G. Sholes Company,** to manufacture machines similar to the model. The machine, therefore, had an appropriate name and under that name, the promoters of the Remington-Sholes Typewriter Company sought to sell it and the inventions therein embodied to appellee and to other parties. Failing in this, in the fall of 1893, they conceived the *scheme* of changing the name of the machine from **"The Z. G. Sholes"** to "Remington-Sholes," and organized another corporation under a new name "Remington-Sholes Typewriter Company," which was later *re-organized* as "Remington-Sholes Company." The reason for the change of name of the model machine from **"The Z. G. Sholes"** and the abandonment of the corporate name **"The Z. G. Sholes Company,"** for "Remington-Sholes

Typewriter Company" was to surreptitiously obtain the benefit of the reputation of name "Remington," long and prominently used by appellee and its predecessors. The Remington-Sholes Company and its predecessors so coveted the name as to determine not to relinquish it, and continued its use despite remonstrances. The benefit to the corporations, "Remington-Sholes Typewriter Company" and "Remington-Sholes Company," was derived from the familiarity with the name "Remington" and "Remington Typewriter" on the part of that portion of the public, which used this class of goods, The history is significant in regard both to the motive of the Illinois corporations in retaining the name and the probable effect of a permanent retention. The machine having the name **"The Z. G Sholes,"** and the Wisconsin corporation, a similar name under which the business could have been carried on, *and the company and its product given a distinct individuality, there was no necessity for an abandonment of those names and the selection and adoption of the name "Remington."* The adherence to the *new* name, "Remington-Sholes," *to the extent of guaranteeing and defending the "Howe Scale Company" in this suit,* indicates the pecuniary benefit which was expected to ensue from the adoption of a name to which purchasers and users had long been accustomed, and the persistence in the use thereof also indicates the pecuniary injury which was liable to come upon appellee. *It is the case of an unnecessary use of a name long previously used by appellee and its predecessors in the typewriter business,* and whilst it was not necessary for the appellee to attempt to discover whether a purchaser had been *actually* deceived, for a manifest liability to deception existed, nevertheless *appellee has shown confusion in business and actual deception in consequence of appellants' use of the designations "Remington-Sholes" and "Rem-Sho."* Admitting for argument's sake that the intent of appellants when they commenced

to use the name "Remington" was innocent, the continuance after they had learned of appellee's prior use, which was clearly established in this case, indicated his deliberate intention to use the name without reference to appellee's prior rights.

As proof of their motive and intent and that they regarded the name "Remington" as *the salient and important part* of the corporate name "Remington-Sholes Co." and the designation of their machine, we again remind the Court of the oft-repeated statement of their agents and dealers, which was set forth in their advertisements, that appellants' machine was the "only typewriter manufactured to-day by a **Remington.** Strong, reliable and accurate, it represents the **second generation** of typewriter manufacturers bearing **this great name.**"

In Croft *v.* Day (7 Beav., 84) it was remarked by Lord Langdale, M. R., that two things were necessary for the accomplishment of a fraud such as was there contemplated: "First, there must be such a general resemblance of the forms, words, symbols and accompaniments as to mislead the public; and secondly, *a sufficient distinctive individuality must be preserved*, so as to procure for the person himself, the benefit of that deception, which the general resemblance was calculated to produce. *To have a copy of the thing would not do*, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold. **For the accomplishment of such a fraud, it is necessary in the first instance to mislead the public, and in the next place, to secure a benefit to the party practicing the deception by preserving his own individuality.**"

What was wanted, by appellants and the promoters of the Remington-Sholes Co. and its predecessor, was a designation which had sufficient resemblance to appellee's trade-name, to *mislead* the public, and still had *a sufficient distinctive indi-*

viduality to procure for them *the benefit of the deception*, which the general resemblance between the names was calculated to produce. To have taken the name "Remington" *alone* would have led the public to the place where they would obtain the *genuine* article, whereas by annexing or adding to it the word "Sholes," appellants secured the benefit of the deception, the purpose of which was to divert and displace the good will of appellee's business. In other words, the purpose of appellants and of the promoters of the Remington-Sholes Typewriter Co. was not to *differentiate* the machines, *but to simulate a resemblance* to appellee's name, sufficiently near *to mislead the purchaser and containing variations to argue about*, should they be brought into court. *This is the usual artifice of the unfair trader.*

Collinsplatt *v.* Finlayson, 88 Fed. Rep., 693; National Biscuit Co. *v.* Baker, 95 Fed. Rep., 135.

As hitherto said, the *suffix*, "Sholes" would either make no impression upon the ordinary purchaser's mind, or it would lead him to believe that appellant's machine was a *new* or *improved* Remington typewriter, manufactured by appellee or that, as the witness Weingart said, "it was one of the kinds of machines the Remingtons manufactured." The ordinary purchaser might infer and believe that the so-called "Remington-Sholes Typewriter" was being made by the same, or a branch of the same concern that manufactured the "Remington" machines, and that the name "Sholes" was the name of a person who had made some improvements in the machines, and, therefore, his name had been used in connection with the old name Remington; or in other words that appellants' machine was an *improved* Remington Typewriter.

R., pp. 264, 265.

Furthermore the name "Remington-Sholes Co." would be likely to induce the belief in the mind of the public that a corporation had been formed by an amalgamation or consolidation of appellee, generally known as the "Remington Typewriter Company" and "Remington Company," with a concern by the name of "Sholes," *and that appellee had ceased to have a separate existence.*

> Manchester Brewing Co. *v.* North Cheshire & Manchester Brewing Co. (1898), 1 Ch., 539.

The name "Remington Sholes Co." would then be regarded as the name of a *new* corporation, composed of the amalgamated concerns, and its product as the "Remington-Sholes" typewriter.

So, also, the name "Remington-Sholes" might lead prospective purchasers to suppose that there was *a connection* between appellee's business and machines and appellants.

It may be conceded for the purposes of argument that when the Remington-Sholes machine was put upon the market by the manufacturers it was not represented to be a "Remington machine." The material inquiry, however, is whether it might not have been offered and sold (as it was) by a dealer of *elastic* conscience as and for a "Remington machine." In the words of the Court of Appeals for the Seventh Circuit (Pillsbury case above cited): Did the name "Remington," as used by appellants, "render a good will precarious?" Was it possible for a dealer having the "Remington-Sholes machine" in stock to so use the name "Remington," which appeared upon the machines, and in all advertisements thereof, as to divert or displace an order for a "Remington machine?" It was said in another case: "It is my decided opinion, confirmed by reflection, that although 'Apenta' could not be passed off as 'Hunyadi' without fraud or gross ignorance on the part of the retail dealer, yet the name on the label, combined with the adver-

tisements, places an instrument of deception in his hands, and, that if he happened to have only 'Apenta' in stock, he might by that means be enabled to supply it instead of and as being identical with 'Hunyadi.' That is enough. *The law is intended to reach, and many authorities show that it does reach not only those who themselves deceive, but also those who enable others to deceive the purchasing public.*"

Saxlehner *v.* Apollinaris Co., L. R., 1897; 1 C. Div., 893.

But whilst it was sufficient for appellee to show a *probability* of deception, we need not rest our argument upon the proposition that the names and designations used by appellants were calculated to mislead the ordinary purchaser of writing machines, *because it was proven in this case that such purchasers were actually deceived.*

Inasmuch as the typewriter of appellants' was marketed in this country, and exported to and sold in foreign countries, in competition with appellee's, this Court will consider the question whether or no the designations "Remington-Sholes" and "Rem-Sho" were calculated to confuse and mislead those persons, who were likely to become purchasers of the machines in any markets where they were sold. To the appellants' contention that the names "Remington-Sholes" and "Rem-Sho" were not calculated or likely to mislead the *ultimate* purchaser, there is one sufficient answer—the historical answer of fact—that the public and purchasers were misled and deceived, and took the appellants' machines as and for the appellee's.

MARKETS NOT LOCAL BUT WORLD-WIDE.

In determining the question whether or no the *ultimate* purchaser is likely to be misled by the use of the name "Remington" in connection with the defendant's business and machines, the remarks of Judge Putnam in the case of Le Page Co. *v.* Russia Cement Co. (51 Fed. Rep., pp. 941, 944, *et. seq.*), are applicable to and of force in the case at bar. He there said: "The products of the Russia Cement Co. are sold to customers and sub-customers throughout the United States, to more than $60,000 annually, and necessarily, on account of their very peculiar character, go into the hands, first and last, of many hundreds of thousands of persons, nearly all ignorant of the circumstances connected with their origin, except what is suggested by the word 'Le Page.' This was the condition of things in existence, or contemplated, when Le Page surrendered his interest in the Russia Cement Co., and, therefore, must be taken into consideration by the Court in determining the rights of the parties. On the other hand, the products of the Le Page Co. of the same general character, have been scattered in the same way, to the extent of over $50,000 annually to innumerable persons, who were necessarily likewise ignorant of their true origin. *The difference is between dealing with a local community understanding all the circumstances, and dealing with the great public scattered throughout the United States, with no opportunities of information, except what is communicated to them by the word 'Le Page' in combination with the word 'Glue.'*"

> To the same effect: Johnston *v.* Orr-Ewing, 7 App. Cas., 219, 225 (1882). Reddaway *v.* Banham (1896), App. Cas., 219.

In this case the proofs show that the machines were sold and used in all parts of the civilized world, and hence in determining the question whether or no the use of the name "Remington," by the ap-

pellants, was likely to create confusion and mislead the public, the Court must bear in mind that we are not dealing with "a *local* community understanding all the circumstances," but are "dealing with the great public scattered throughout" the civilized world, with no opportunities of information, except what was communicated to them by the designations "Remington" typewriter and "Remington-Sholes" typewriter. Abroad, to the Danish and Russian purchaser, "Remington-Sholes" must have meant the "Remington" typewriter.

R., pp. 896, 986.

THE ABBREVIATED NAME "REM-SHO."

The learned Judge who tried this case in the Circuit Court said: "The long name Remington-Sholes, got shortened into Rem-Sho, in writing and speech in conducting the defendant's business which was well understood to be an abbreviation of the full name. The defendant has put the abbreviation upon the machines in place of the full name; and claims that this, at least, is so different from the name Remington as used by the plaintiff, and its predecessors that it can, and does, not amount to any representation that the machines are Remington machines. If this short name had been the one first used there would be much plausibility in this argument; but following Remington-Sholes as it has in use, it has become a well known short representation of what the long name it stands for represented, and of itself now amounts to a wrongful representation of the source of the defendant's machines.

According to these views the plaintiff appears to be entitled to a decree suppressing the use of the name Remington in the compound name of "Remington-Sholes," and the use of the compound abbreviation of that name upon the defendant's typewriting machines or in the sale thereof."

In the decree entered on the decision of the Circuit Court, the Howe Scale Company was enjoined from using the abbreviation or short term "Rem" as a whole or part of any designation upon or in connection with the sale of typewriting machines. The Court of Appeals for the second circuit held and found that the use of the name "Rem-Sho" was not sufficiently like "Remington" to be by itself a reasonable cause of confusion. In thus deciding and holding it is respectfully submitted that the Court of Appeals erred.

It has hitherto been shown that "Rem" was known to the public as an abbreviation of the name "Remington," *at a period anterior to the organization of the "Remington-Sholes Typewriter Company," that is to say as early as the year 1892.* The appellee's machines have ever since that time been frequently referred to and designated as the "Rem," and "Rem Typewriter." *The public was therefore educated to know and did know at the time the designation "Rem-Sho" was first selected and used by Remington-Sholes Co. that "Rem" meant "Remington," and referred to appellee's writing machines. It was also shown by* both appellee's and appellants' witnesses, that "Rem-Sho" was known as, and understood to be, *merely an abbreviation of the hyphenated names "Remington-Sholes,"* and it was further proven that this abbreviation was always *intimately associated—inseparably associated*—with the hyphenated name "Remington-Sholes." The designation, "Remington-Sholes" appeared in all advertisements and upon all machines, which were manufactured by the Remington-Sholes Company and sold by appellants.

It is a matter of common knowledge that corporate names and trade-names are frequently *abbreviated or shortened* to economize space and time. In the typewriter trade it was common to abbreviate the trade-names of the different makes of writing machines.

R., pp. 135, 190, 207, 1044, 1426.

The public had been educated to know that "Rem" was an *abbreviation* for the name "Remington," long before the "Remington Sholes Company" or its predecessor used it. The name "Remington Sholes" was shortened into "Rem-Sho" to get an abbreviated telegraphic code address for the "Remington-Sholes Typewriter Company."

R., pp. 1353, 1448.

"Rem-Sho" was not put upon the machines until July, 1897. Prior to that time the full designation "Remington-Sholes" was used, and it is alleged by appellants that the machines became known to the public under that name. The *only* change made was to *shorten* the designation of the machine, the abbreviated cable address "Rem-Sho" being substituted for the *full* name. The corporate name "Remington-Sholes Company" was placed on the machines as theretofore. Obviously the machine continued to be designated and spoken of as the "Remington-Sholes typewriter," and "Rem-Sho" was understood to be, as it was, *merely an abbreviation* of the full name, which always accompanied "Rem-Sho" upon the machines and in all advertising media. Inasmuch as the abbreviation "Rem" was used, more or less, as a designation for appellee's machines, prior to the adoption and use of it by the "Remington-Sholes Company" and its predecessor, it is plain that "Rem" could not be appropriated by appellants' any more than the name "Remington," for which it stood.

The designation "Rem-Sho" was in use *prior* to 1897, and *stood for and meant "Remington-Sholes." It had a definite and well understood meaning*, as appears by the evidence in this case, *and hence it was not, to the mind of the public, a fanciful or meaningless term or designation*, as hitherto asserted by appellants' counsel. Moreover, in *foreign* countries, as well as in *this* country, appellants' machines continued to be, by agents and dealers,

advertised and referred to as "Remington-Sholes" typewriters.

R., pp. 869, 882, 883, 884 888, 893, 896, 898, 900, 908, 909, 957, 958, 975, 976, 977, 978, 979, 983, 986.

Inasmuch as the typewriter of appellants' ◆◆ was marketed in this country and exported and sold in foreign countries, in competition with appellee's, this Court will consider the question whether or no the designations "Remington-Sholes" and "Rem-Sho" were calculated to confuse and mislead those persons, who were likely to become purchasers of the machines in any markets where they were sold. To the appellants' contention that the names "Remington-Sholes" and "Rem-Sho" were not calculated or likely to mislead the *ultimate* purchaser, there is one sufficient answer—the historical answer of fact—that the public and purchasers were misled and deceived, and took the appellants' machines as and for the appellee's.

The use of the abbreviation "Rem-Sho" was *inequitable*, as being constructively an "*unecessary*" and improper use of the name "Remington," and whether the machines of appellants went into the market as "Remington-Sholes" or Remington-Sholes Co.'s "Rem-Sho," these designations were regarded as synonymous, and to the ordinary purchaser implied the original manufacture—a "Remington" machine. It, therefore, results that appellee's right of action included the use of the *abbreviated form of expression* by which the name "Remington" was made to be of value for evil in carrying on an unfair competition. There was the same unfair and disengenuous use of the name "Remington" under a different kind of a disguise.

Valentine Meat Juice Co. *v.* Valentine Extract Co., Ld. and others, 17 Pat. Rep., 673; Amoskeag Mfg. Co. *v.* Garner, 54 Howard's Prac. Rep. (N. Y.), 297, 300.

In both of the cases last above cited, the abbreviations were enjoined. In the first case, the abbreviation was "Valtine," and in the second one "A. M. Co." In the latter case, the Court observed: "For instance, in view of the evidence in this case, the defendants could no more rightfully call their prints 'A. M. Co. Prints' than they could style them the 'Amoskeag Mfg. Co. Prints,' *because that would still be a representation, less full, pointed and direct, but none the less fraudulent, that the prints were of the plaintiff's production. 'A. M. Co.' is not merely a trade-mark, but a well-known, long used and thoroughly understood abbreviation of the plaintiff's name.*"

ALLEGED DEFENCES.

First.—The appellants allege in their answer and state in their catalogues that by reason of difference in appearance and in construction and mode of operation of its machine from all others upon the market, no intending purchaser, having sufficient intelligence to operate a typewriting machine, could possibly be mistaken into purchasing those manufactured by the "Remington-Sholes Company" and sold by appellants as and for writing machines of appellee's manufacture. In the first place, it is to be noted that appellant's machine was a *shift* machine, printing both capital and small letters; the *platen-carriage* being shifted in appellee's machine, while in appellants the *type-basket* was shifted.

In "Complainant's Exhibit Instructions to Agents by the Howe Scale Co." (R., pp. 874, 881) it is said: "*The Rem-Sho is the only machine made which has the universal or standard Remington keyboard, which 95 per cent. of operators are familiar with.*" * * * * And again: "The escapement on our machine is nothing more than the escapement on the old No. 2 Remington ma-

chines, only in place of operating vertically it operates horizontally. No better escapement was ever gotten up." Thus it will be observed that the Remington-Sholes Co. adopted that style of machine known as the "shift machine," and also adopted and used the "Standard Remington key board," for the reason that 95 per cent. of operators were familiar with it. It is true that there were some differences in appearance, between appellee's and appellants' machines, but those differences would escape the attention of the ordinary purchaser of writing machines, who is not familiar with *details* of structure, and if he noted them at all, would be led to suppose that *the differences simply indicated different models or styles of writing machines made by the same manufacturer.* The proofs in this case show *that purchasers ordinarily* are of that class who are unacquainted with the *physical* characteristics of the machines; that it is the *exception* that the buyer possesses *any information in detail* of the typewriter, and that it is the *rule* in the *larger* cities that the *business man does not even examine* the machine which he purchases. *Moreover in this country, very few buyers are operators.*

A large class of purchasers, therefore, buy the machines with no information except what is communicated to them by the word "Remington" in connection with the word "typewriter." The purchaser "is not bound to study or reflect." "He acts upon the moment." "He is without opportunity of comparison." *He relies upon the name and repute of the machine.* These facts, in connection with the further fact that the market is not *local* but world-wide, must be taken into account by the court. The contention of appellants that their machines were in finish and outward appearance unlike appellee's, and therefore, that the public and purchasers of typewriting machines could not be misled was, practically, abandoned and not

regarded as of force in this case, because the proofs show that the appellants put upon the market writing machines, which *in external appearance, finish and design* much more nearly resembled the machines of appellee than those first manufactured and sold. *The machines were japanned in black, and were designated the No. 6 "Remington-Sholes" or "Rem-Sho."*

The attention of the court is, also, called to the fact that appellee's "Remington No. 6 machine," was and is the one principally sold and used in this country. Either appellants did not regard *the mere external appearance and finish of their machines* as of any consequence, in so far as *the question of infringement* was concerned, or else they grew bolder and their desire for gain induced them *to closely simulate the design and finish of appellee's machines*, and to designate their *new* model the "Remington-Sholes" (Rem-Sho) No. 6. It will be observed that in one case it was the "Remington No. 6" and in the other the "Remington-Sholes," or "Rem-Sho No. 6."

Moreover, this gradual approximation of "get up" and description to appellee's product, was a badge of fraud; nor is it an answer to say that japanning typewriters in black, or designating them by numbers was common to the trade when they were used in connection with appellee's trade name "Remington."

Lever *v.* Goodwin, 36 C. D., 1.,

But conceding, for argument's sake, that appellee's and appellants' machines were somewhat different in finish and external appearance, nevertheless the trade-name and designation "Remington" had been so long and exclusively identified with the business of appellee, as to inform the public that that name upon writing machines meant that they were its product, and since appellant adopted and used that name, it was not material that their machines had

not also the *particular* design and finish in which appellee's typewriters were presented to the public.

> Fuller *v.* Huff, 104 Fed. Rep., 141; Hier *v.* Abrahams, 82 N. Y., 519; Le Page Co. *v.* Russia Cement Co., 51 Fed. Rep., 941, 945.

In the case last cited, the Court aptly said: "*The essential thing* is its (plaintiff's) right to inform the public that it is in the exclusive possession of all the advantages coming to it as the legitimate *successor* of the original formulator of 'Le Page's glue,' and is alone entitled to put on the market that product, supposed to be composed or manufactured with special skill, and known to come from the original and long established concern."

In the Higgins case it appeared that the labels on the manufactured articles of the respective parties were entirely different. One used a ~~big~~ *bright yellow* label and the other a *blue* one. The distinctive word "German" which plaintiff used on its product was absent from defendant's label.

> Chas. S. Higgins Co. *v.* Higgins Soap Co., 71 Hun, 101; S. C., 24 N. Y. Supp., 801, 802.

In the Valentine Case (83 L. T. N. S., 271) the packages were dissimilar, the plaintiffs being a meat juice in liquid form and the defendants preparation was put up in the form of meat globules.

Second.—The appellants allege that it was the practice of ~~its principal~~, "Remington-Sholes Company," to mark its machines with the words "Remington-Sholes" and with the word Chicago; that it had used those words in its advertisements, etc., and thereby its machines had become distinctively known, and were differentiated by the public from those of appellee's manufacture. Now, while appellants' proofs show that the words "Remington-

Sholes" and the word "Chicago" always appeared on its machines, and in its advertisements, there is no proof that the purchasing public thus recognized or differentiated its machines from appellee's. In the first place, it is to be observed that the hyphenated name "Remington-Sholes," which is alleged to have been stamped upon all machines and to have appeared in appellants' advertising media, are *the very words here in controversy*, that is to say, they contain appellee's trade-name and designation "Remington," combined with the suffix "Sholes." *This is, therefore, not the case of a manufacturer bearing a non-infringing name*, who stamps it on his goods, *but it is one where both the designation of the goods and the manufacturer's name stamped thereon* are alleged to infringe upon appellee's rights. In other words the stamping of the *corporate name*—"Remington-Sholes Company"—upon the machines was *an aggravation and not a justification*. **Both names indicated Remington connection, and implied the original manufacture.**

In Menendez *v.* Holt, 128 U. S., 514, the Court held that the use of the defendant's name in its advertisements did not tend to rebut the proof of fraud; and that if the ordinary purchaser would be deceived by the designation employed, defendant must be debarred from using it.

In that case this Court said: "Holt & Co., then having acquired the exclusive right to the words 'La Favorita' as applied to this particular vendable commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Rider accompanied the brand upon flour sold by the appellants instead of the name of Holt & Co. That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor."

To the same effects are Powell *v.* Birmingham V. B. Co. (1894), Ch. 449 (1896), 2 Ch. 82; Eno *v.* Dunn, 15 App. Cas., 252 (H. of L., 1890); Montgo-

mery *v.* Thompson, 64 L. T. R. N. S., 748 (H. of L., 1891); Southern White Lead Co. *v.* Cary, 25 Fed. Rep., 125; Newman *v.* Alvord, 51 N. Y., 189; Carroll *v.* Ertheiler, 1 Fed. Rep., 688; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf., 599; Wotherspoon *v.* Currie, L. R. 5 H. L., 508; N. K. Fairbanks Co. *v.* Central Lard Co., 64 Fed. Rep., 133, 136.

The name Remington-Sholes Company did not differentiate the products of appellee and appellants, but confused their identity and led purchasers to take appellants' machines as and for appellee's.

Nor is it any *defense* to this action that the appellants placed their *address or place of manufacture upon the machines.* Gray *v.* Taper-Sleeve Pulley Works, 16 Fed. Rep., 436; N. K. Fairbanks Co. *v.* R. W. Bell Mfg. Co., 77 Fed. Rep., 869.

In the Taper-Sleeve Pulley Works case, above cited, Judge Atchison said (p. 442): "It is, however, urged that it is impossible that *the works at Dubuque, Ia., should be confounded with the works at Erie, Penn.*, and highly improbable that any one should be misled, as the words, 'Of Dubuque, Ia.,' are plainly added to the defendant's name on its goods, and also appear in all its advertisements, circulars, etc. But the business of the complainants and the defendant, respectively, *is not local;* their trade is co-extensive with the whole country, and even passes beyond. The complainant's most fruitful field of operations lies nearer to Dubuque than to Erie; and into that field the defendant may enter to sell under the reservation in the contract between Willard & Gray. There is credible evidence that no little *confusion* has actually arisen, and I think such is the unavoidable result of the double use of the same trade-name in this business."

Here the machines are sold and used not only in all parts of the United States, but also in foreign countries.

Appellee has for many years carried on a large business in *Chicago*, and in the territory adjacent

thereto, and the court will note the further fact that it has been proven herein *that much confusion in business arose in Chicago* in consequence of appellants' use of the word "Remington" in its *corporate* name, and the same name upon its machines and in its advertisements. The fact, however, is that the ordinary purchaser of writing machines does not go into *details*. He does not examine *name plates or catalogues* to ascertain by whom or where the machines are made.

R., pp. 370, 371, 450, 451, 452.

Very few purchasers know where or by whom the machines are manufactured.

R., pp. 451, 544.

It is not necessary that the public should know the name of the trader who uses the trade-mark or trade-name.

Powell *v.* B. V. B. Co. (1897), A. C., 715.

Furthermore, the name and address, Remington-Sholes Company, Chicago, might suggest to the intending purchaser that appellants' business was a *branch* of appellee's.

R., pp. 999, 1000.

Third.—The appellants allege in their answer that the "Remington-Sholes Typewriter Company" and "Remington-Sholes Company," in the advertisements of their machines, and upon packing cases enclosing the same, as well as upon their circulars, letter-heads, signs, etc., displayed the words, "Not the Remington Standard," for the purpose of cautioning the public not to *confuse* their machines with appellee's.

R , p. 25.

The *only* evidence in support of this allegation is that *for a short while the "Remington-Sholes Type-*

writer Company" displayed those words upon the window of its *Chicago* office, and caused them to be printed in the *Chicago* Business Directory for the year 1894.

R., pp. 439, 1358, 1445.

There is no evidence showing that this advertisement in the Chicago Directory was continued after the year 1894, and the Court will bear in mind that the so-called "Remington-Sholes Typewriter" was not placed on the market until about January, 1895. How long this statement remained on the window of the Monroe street office in Chicago does not appear, but it does appear that the Remington Sholes Type writer Company, or Remington-Sholes Company subsequently removed their business to another building. There is no evidence that this statement was displayed on the windows of any other offices or upon the signs of those companies. Those words were not affixed to or placed upon the machines or the packing cases, or in any position where the ordinary purchaser would be likely to see them. It is, therefore, manifest that a notice on the *office window at Chicago*, and in the *Chicago Directory for 1894*, would not inform the public *elsewhere* that the "Remington-Sholes Typewriter was not the Remington Standard." But even if the ordinary purchaser had observed the notice he might suppose that it only referred to *a different model or style of writing machine made by the same manufacturer*, and that the names "Remington Standard" and "Remington-Sholes" were simply employed to distinguish the models, one from the other. Moreover, it was established in this case that purchasers and the public generally have, for many years, known and identified the appellee's product by the word "Remington," and that comparatively few know its product as, or identify it by the words "Remington Standard."

That the word "*Standard*" does not serve to *identify* appellee's product was proven by appel-

lants. Appellants' witnesses, Baldwin and Hobbs, testified, in substance, that the word "Standard" meant any machine of $100 value, of a *standard* make, *and that said word did not point to or indicate the product of any particular manufacturer.* If this testimony be credible, then it is plain that the words "Remington Standard" do not identify or indicate appellee's products, and when employed by appellants, they served rather to *confuse* than to *enlighten* the ordinary purchaser. Obviously, comparatively few purchasers of typewriting machines, *even in Chicago*, ever saw the above quoted words upon appellants *office window* in that city, or in the *Chicago Directory*, and *there is no evidence that those words were ever displayed elsewhere.* Postulating that this is a case where appellants might have relieved themselves from legal liability by placing a distinctive and an adequate notice upon the machines, nevertheless, it is perfectly clear from the proofs herein, that the alleged notice to the public was wholly inadequate and is not of force as a defense to this action. Furthermore, we submit that this notice or statement, and others of like import, made by appellants, were improper and calculated to injure complainant's business rather than to protect it.

Pillsbury *v.* Pillsbury Washburn Flour Mills Co., 64 Fed. Rep., 849.

But this notice assumed that appellants were rightfully and lawfully using the name "Remington" upon their machines, or in other words, that the case was like that of an *individual* who was lawfully using his own name in a proper manner, and was taking the necessary precautions to distinguish his goods from his rival's. Such, however, is not the case at bar. Here the question is not one of a name which the appellants could lawfully employ, as the name Remington was simply appropriated from the appellee, and all use of it by ap-

pellants could not be otherwise than unfair. Furthermore, the statement upon the *Chicago* window and in the *Chicago* Directory tended to *injure* appellee, in that intending purchasers who saw it might regard the statement as an intimation that the "Remington-Sholes Typewriter" was the *genuine* "Remington" make, and that the so-called "Remington Standard" was to be avoided.

But the printing of the words above quoted did not repair the wrong in the case at bar.

> McCann *v.* Anthony, Am. Trade-Mark Cas., 1055, 1059, 1062. Dunlop P. Tyre Co., Ld. *v.* Dunlop, Truffault, C. & T. Mfg. Co., Ld., 12 Law Times Rept., 434. Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed. Rep., 357. 368.

Appellee contends that the cases in which an *individual* has been permitted to use his own name, although similar to plaintiff's, upon his goods, provided his name was accompanied by a statement upon the goods sold that he was distinct from plaintiff and had no connection with plaintiff's business, etc., are not applicable to the case at bar, for the reason that "Remington-Sholes Company" was not the name of any individual but was an *artificial* name invented for the purpose of obtaining the benefit of the repute of appellee's product and business. Also, because "Remington-Sholes" or "Rem-Sho" did not refer to "Remington" the *individual* but to the *product* of appellants' designated "Remington-Sholes" and "Rem-Sho" typewriter, by which means or designation appellants sought to get the benefit of the reputation, which had attached itself to appellee's product known as and designated by the "catch words" "Remington Typewriter." The case at bar is analogous to the Higgins, Rogers, Valentine and other cases, where the use of the plaintiff's trade-name, by the defendant, was unnecessary and improper and therefore suppressed,

and is clearly distinguishable from that class of cases where the names used had become *publici juris*.

Fourth. Appellants allege that in their catalogues they notified the public that the "Remington-Sholes Company" had no connection with the "Remington Standard Typewriter," and cautioned customers against confusing the "Remington-Sholes" or "Rem-Sho" machine with the "Remington Standard." The cautionary matter referred to will be found in appellant's calalogues *near the end thereof*, under the heading "In regard to our name." Instead of printing this matter at the *beginning* of the catalogue, and in a *conspicous* place where the *prospective* purchaser, who happened to examine the catalogue might possibly read it, this explanatory matter was placed *near the end of the catalogue*, and preceded by more than *twenty* printed pages. We have hitherto called the attention of the Court to the fact that in appellants' catalogue, "Complainant's Exhibit Rem-Sho Booklet," and "Complainant's Exhibit Remington-Sholes McGurrin Catalogue," *the first and most conspicuous announcement therein* was the statement—**"The only machine now made by a Remington"**—which was the *only* printed matter on the page. This indicated that one of the *first* things, which appellants desired to impress upon the mind of the *prospective* purchaser was that the so-called "Remington-Sholes," "Rem-Sho" typewriter was "a Remington" typewriter. This language would, and was intended to convey, a false impression to the purchaser of writing machines, who would understand it as refering to a machine emanating from the old Remington concern or the successors thereof. The *prominence* given to those words in the catalogue, and the printing of the same at the *beginning* thereof, *and placing the explanatory matter at the end where it was not likely to be seen or read*, clearly show the motive and intent of appellants. The statement near the end of the cata-

logue, as already pointed out, was in many *material* respects untrue, and was calculated to *mislead* rather than to *enlighten* prospective purchasers of writting machines. It will be noted that appellants never cautioned the purchaser that the "Remington-Sholes Company" had no connection with the old Remington concern, or the "Remington Typewriter Company," or with the *manufacturers* of the "Remington Typewriter." Comparatively few purchasers of typewriting machines read catalogues when handed to them, and if they examine them at all, do so very superficially and hurriedly.

R., p. 370.

It is plain that few purchasers would notice the explanation in the catalogue entitled "In regard to our name," and of those who did, nineteen out of twenty would simply regard the statements, taken in connection with the words above referred to, as an intimation that appellants machines were the *genuine* "Remington," *and that the "Remington Standard" typewriter was to be avoided.* In this connection the attention of the Court is invited to defendant's exhibit Remington-Sholes "Instructions to dealers" (R., p. 1453). In those instructions, issued after suit was commenced, are found these words: "Notice:

"We do not want any of our dealers, agents, travelling men, or salesmen, to make any *misrepsentations* in regard to our machine, neither do we want them to connect either the machine or the company with the "Remington Standard Typewriter Company." *We do not consider that it does us amy good to make this comparison*, and what we want is that our representatives sell our machine on its merits alone, which we believe are sufficient to enable them to meet competition, *and we do not feel at all flattered to have the title to our machine and that of the Remington confused.*"

This shows that appellants were conscious of the fact that *the name they were using in their busi-*

ness and upon their machines was calculated to mislead, and that their dealers, agents and salesmen were trading upon the name "Remington" and the good will associated therewith, but they hoped by these *pretences* and shows of virtue to avoid liability for infringement if brought into Court to answer for their unfair dealings. The remarks of the learned Court of Appeals of the Sixth Circuit in the case of Garrett *v.* T. H. Garrett & Co., 78 Fed. Rep., 472, 475, are pertinent in this connection. We quote as follows: "T. H. Garrett in his affidavit says that when the company was reorganized, Holloway brought up the question whether their brands and labels could be mistaken for those of complainant's or others, and that counsel were consulted on the subject, and that they advised certain changes 'out of abundant caution,' which were made. He affirms that these measures were taken 'to prevent confusion in the labels before there was any intimation of any dissatisfaction, or complaint on the part of complainants or anybody else.' He also refers to and quotes from the circular put out by the defendant company, December 31, 1895, *in which the hope is expressed 'that no one who tries our snuff will take it for theirs; that we should hate to have any one who has used our snuff use theirs afterwards, under the impression that it was ours, because it would hurt his opinion of our goods; and that we trust that everybody who tries our snuff will notice and remember that it is made by us and not by them.' If all this be true, why did defendant company, upon re-organization, cling to the name 'T. H. Garrett & Co.'? If that name had been attached to goods of inferior quality, why, in the re-organization, was it not dropped and another substituted, which would have relieved the company from the odium resulting, as they now claim, from the inferior quality of the snuff sold under that name?* T. H. Garrett was the owner of only two-and-a-half shares of the capital stock, the entire number of shares being three hundred and

fifty. He was not made an officer of the new company, and had only a subordinate position as an employee. *There was no apparent reason why his name should be adopted as the corporate name, unless it was that 'Garrett's snuff' had a reputation, and was in demand by the users of snuff all over the South—the territory sought to be occupied by the defendant company.* The statement, made by Holloway in his affidavit, that the only reason for retaining the name of T. H. Garrett in the name of the corporation was that he was the original projector and promoter, and that it would have been an unnecessary and unfair reflection on him to have changed the name, is mere pretense and sham, too bald to be even plausible."

In the Pillsbury case *ubi supra*, the Court observed (64 Fed. Rep., 848, 849): "The answer asserts that 'They have always stated and made known to their customers that said flour so handled by them under said brand is not the flour of the complainant's, but is a flour put up under said brand by themselves, manufactured from Minnesota wheat, and that said flour in their judgment is equal to, if not superior, that sold by the Pillsbury-Washburn Flour Mills Company, Ld.' It may be remarked in passing, that if these brands are so dissimilar that the 'most casual observer' cannot be imposed upon, why assure purchasers, wholesale and retail dealers, who are expected to be and naturally are more careful than a purchaser of a single package, that the goods sold were not the product of the Pillsbury Mills? *If the dissimilarity was manifest there would seem to exist no necessity for such assurance;* and yet we are inclined to give credence to the assertion of the appellants in this respect, and therein we think we discover the keynote of this scheme. They sell their goods with the false and simulated brand upon them to wholesale and retail dealers at a price below that for which the genuine product of the Pillsbury Mills can be purchased by them. They disclose to the re-

tail dealer their mode of procedure and their object. They appeal to the greed of their customers to purchase an inferior quality of flour, thus falsely branded with the name of the superior article, that the dealers may palm it off as the genuine article. No ingenuity could devise a more effectual way to pirate a good will. In the large, bold, displayed words 'Pillsbury's Best' and 'Pillsbury's Best XXXX' they address the general public. In their dealings with middlemen they declare the truth, making them accomplices in the fraud for their share of the profit. *True representations in aid of false ones, but aggravate the fraud.*"

In Walter Baker & Co. *v.* Saunders, 77 Fed. Rep., 181, 185, Judge Paul said: "The respondent states in his answer that 'he has from the beginning, and day by day, in the whole conduct of his business, by letterheads, price lists, cards, most extensive advertisements, and in every way known to commercial methods, warned dealers and the public against the possibility of confusing respondent's name with that of any other Baker & Co., engaged in the chocolate business.' This he says is done by conspicuously printing on his letterheads and in his advertisements, 'Positively no connection with any other Baker & Co. chocolate makers,' and by an advertisement as follows: 'You will find other brands of chocolate and cocoa placed on the market under the name of Baker & Co., but take only that having the initials 'W. H. Baker & Co.' and then you will always be satisfied.' Conspicuously with these announcements also appear the words 'Established in Mercantile Business 1785.'"

A similar defense was made in the case of Pillsbury *v.* Flour Mills Co., 12 C. C. A., 432, 64 Fed. Rep., 841, and in that case the Court said: "*We may in this case, with propriety ask if the goods of the respondent are so distinctively marked as to prevent confusion with those of the complainant, why the necessity of these frequent warnings to the public that they are not the goods of the complainant?*"

The above quoted excerpts fully meet and answer the defendant's contention, for paraphrasing the language of the learned Court, we may in this case with propriety ask if the machines of appellants were so distinctly marked, and of such design and finish *and so designated as to prevent confusion with those of appellee, why these frequent warnings to the public that they were not the machines of the appellee*, or to use, substantially, the language of the appellant's catalogue that the "Remington-Sholes Company" had no connection whatever with the "Remington Standard" typewriter.

In the excerpt from appellants' catalogue, above referred to, are these words: "We are sometimes asked about the right of the Messrs. Remington and Sholes to the use of their own names in connection with typewriters." It would appear from this statement that the question had been raised—probably *by dealers or purchasers*—whether or no the Remington-Sholes Company had the right to use the name "Remington" in its corporate name, and as part of a designation for its machines. This inference is confirmed by the letter of Franklin Remington, of January 22, 1896. *He there says that he and his associates did at the outset and have continuously since consulted eminent counsel as to the right to use the names Remington and Sholes.* The appellants and Franklin Remington appear to have labored under the same *misapprehension* as did F. G. Stewart, who organized a corporation bearing his name for the purpose of selling "Dr. Stewart's Dyspepsia Tablets," there being another brand on the market known as "Steuart's Dyspepsia Tablets." In that case, Judge Jenkins speaking for the Circuit Court of Appeals of the 7th Circuit (91 Fed. Rep., 243, 247, 248), said: "Almost in his first attempt to market his wares, *he was advised by dealers* that he was encroaching upon the rights of the appellant. It is manifest that he was. Stewart justified himself to the wholesale dealers, who cautioned him, *by the claim that he used his own*

name, and that he had a right to use it as he would. Therein he was in error. A man may not use his own name to accomplish a fraud, designed or constructive."

The vice of the statement in appellant's catalogue consists in the assumption that Messrs. Franklin Remington and Zalmon G. Sholes were using their own names in their own business. Such was not the fact. The name "Remington-Sholes Company" was not the name of *any individuals, but was an artificial name invented for a purpose*, and the designation "Remington-Sholes" used upon appellants' machines did not refer to "Remington" and "Sholes" *the individuals* but to the *product* of appellants—the Remington-Sholes typewriter. In other words the name "Remington" was used as the name, or part of the name of appellants' machines and not as that of the individual, Franklin Remington, the artificial (corporate) name designating a business in which Franklin Remington then had only one-twentieth interest that is he owned 150 of the 3,000 shares of the capital stock of the Remington-Sholes Co. Manifestly he lost his identity in that of the corporation Remington-Sholes Company.

Fifth. It is alleged in appellants' answer, and it was contended below that the trade and purchasing public distinguished appellee's machine not by the word "Remington" but by the words "Remington Standard," the red seal trade-mark and the words "Manufactured by Wyckoff, Seamans & Benedict, Ilion, N. Y., U. S. A." These allegations and this contention are wholly inadmissible for the reason that the proofs in this cause are to the contrary, in that the evidence shows that the public *generally* distinguishes appellee's product by the word "Remington," and "does not go into the minuter refinements of the title" on the machines.

Baker & Co. *v.* Saunders, 80 Fed. Rep., 894, and cases previously cited.
Kerly on T. M., 2d Ed., 491.

The testimony of Browne (R., pp. 450, 451) and that of Stallwood, Weingart and others, establishes this fact. It is undoubtedly true that appellee has used the word "Standard," its red seal trademark and its corporate name upon its machines and in its advertising media, but it never did so except in connection with the name "Remington," and by so doing it has not in any manner created an *estoppel*, whereby it is concluded as to the broader and more generic right to be protected against the unfair competition in the bill of complaint described.

Orr-Ewing & Co. *v.* Johnston & Co., 13 Ch. D., 434.

The beginning and foundation of every extensive good will and business is a knowledge of the fact that the article exists.

The introduction of an article is accomplished by making known its name To inform the public that there is such a writing machine as the **Remington** typewriter is to introduce it. For many years, appellee and its predecessors have continued diligently and in many ways to inform the public of the existence of the "**Remington typewriter.**" The fact that *specific trade-marks* have been employed, in connection with the name "Remington," has not affected the *generic* popularization of the name of the machine. It may be said for the purposes of argument, that there is one class of purchasers, which is necessarily large, that knows appellee's machine as the "Remington," or "Remington typewriter," and that a smaller number have a more *specific* knowledge and know it as the "Remington Standard Typewriter," or "The Remington Standard" with a red seal, etc. But it is a matter of common knowledge that the names of products which have been upon the market for many years acquire almost universal currency. In many cases the name is known and used without

a distinct recollection or use of the technical trade-mark, which may long have been attached to the article. Many illustrations of this fact might be given, as for example, "Rogers Cutlery," "Gorham Plate," "Baker's Chocolate," "Babbitt's Soap" and "Clark's Thread." In most cases the retail customer or prospective buyer of average intelligence has *no recollection of the technical trade-marks, or the places where the goods are manufactured, or the names of the manufacturers which have invariably been attached to the goods.* He remembers only "the short trade phrase and abbreviated and popular form" of expression or "catch words" to which the names upon the goods give currency, and relies upon them in making his purchases. Hence under any view of this question, which may be taken, it follows that *the large class of purchasers* who know and distinguish appellee's product by the "catch words" "Remington" and "Remington typewriter" is entitled to protection against the unfair and fraudulent acts of appellants.

Sixth. The appellants admit in their answer that appellee registered the name "Remington" as a trade-mark on or about October 23, 1888, but deny that said word constitutes proper subject matter that could be appropriated by any one as a trade-mark for typewriting machines.

R., p. 20.

Whether the registration of the word "Remington" as a trade-mark was a proper and lawful one is a matter of no consequence in this case.

In Garrett *v.* Garrett, 78 Fed. Rep., 477, the Court of Appeals of the Sixth Circuit said: "That the complainants were entitled to the use of the word 'Garrett' on their labels as a trade-mark or as *a descriptive word*, is, in our opinion, beyond question upon the undisputed facts of the case. They and their predecessors had enjoyed such use for many

years and had built up an extensive trade based upon it. *Even if it could not be used as a trade mark, it is to be treated as a descriptive term, to the benefit of which they are entitled.* It was so held by the Court of Appeals of this Circuit in California Fig Syrup Co. *v.* Frederick Stearns & Co., 20 C. C. A., 22, 73 Fed. 812, and in Salt Co. *v.* Burnap, also decided by the Court of Appeals of the Sixth Circuit and reported 20 C. C. A., 27, 73 Fed., 818."

To the same effect are the cases of DeLong *v.* DeLong Hook & Eye Co., 32 N. Y, Supp., 204, and Reddaway *v.* Banham (1896), A. C., 199, and many other cases.

The registration constituted an assertion of a proprietary right in and to the name "Remington" as a trade designation for appellee's machines as early as 1880, and was notice to the public of its claim.

Seventh. Appellants' denial of any fraudulent purpose to market and sell their writing machines upon the established reputation of appellee and its predecessor's business and as their product, etc., cannot avail in this case.

(1) Because as hitherto shown they *knew* the facts in respect to appellee's business and product and had due notice of appellee's rights and claims in the premises, and after such notice continued to use its trade name.

R., p. 1444, 291, 292, 805, 809.
Higgins Co. *v.* Higgins Soap Co., 144 N. Y., 471.
Holmes *v.* Holmes, Booth & Atwood Mfg. Co., 37 Conn., 278.
Fuller *v.* Huff, 104 Fed. Rep., 145.
Saxlehner *v.* Eisner, etc., Co., 179 U. S., 41.
Orr-Ewing *v.* Johnson, 13 C. D., 454 (1880).

(2) The appellants acted in a manner that naturally tended to deceive the public, and the public was deceived by their acts, and hence they are

presumed to have contemplated the natural consequences of them.

R. Heinisch's Sons Co. *v.* Boker, 86 Fed. Rep., 765.
Gray *v.* Taper-Sleeve Pulley Works, 16 Fed. Rep., 436, 442.

In the Gray case, Judge Atchison aptly observes:

"The defendant company, indeed, in its answer, stoutly denies any fraudulent purpose or intention to injure the complainants. But the company must be judged by its acts rather than by its words. It requires a great stretch of charity to acquit the defendants of actual wrongful purpose. *But, whatever the secret intent, the stubborn fact remains that the conduct of the defendant does tend to induce the public belief that its establishment is a branch of the complainant's or connected therewith, and it must be taken to intend the natural consequences of its acts.*"

Neither Fay nor Remington were called as witnesses to deny the allegation of fraudulent intent charged in the bill, nor have they given any explanation of how the "Remington-Sholes Typewriter Co., or Remington-Sholes Co. came into existence.

Eighth. In respect of the contention of appellants and that they had the right to publish and to assert that the "Remington-Sholes" or "Rem-Sho" typewriter was the only writing machine made by a Remington, etc., because that statement was truthful, in that Franklin Remington was connected with the Remington-Sholes Company, it is to be said: *first*, that if the statement implies that appellants' machine was manufactured by him, we have shown that such was not the fact, and *second*, that it was an *unnecessary*, improper and fraudulent use of the name "Remington," which by long and exclusive use had come to mean appellee's writing machines.

"A Remington" means a writing machine possessing certain excellent qualities and made by the successors of the old Remington concern.

In International Silver Co. *v.* Simeon L. and Geo. H. Rogers Co. (110 Fed. Rep.), 955, 960, where the Defendants had asserted in advertisements, etc., that they were the only real Rogers Bros. in the business, etc., the Circuit Court, speaking through Judge Shipman, said: "This reason for the action of the Defendant corporation existed, but it had also a broader motive, which was to impress upon the public the belief that its business is a continuation of the character and the business of the original firm, and of gaining thereby an advantage over those who are the rightful successors in the same business. This practice shows the unjustifiable use which the corporation is attempting to make of the position of the two sons of Simeon S. Rogers in its business, and the assertions should be restrained by injunction."

In Chickering *v.* Chickering (120 Fed. Rep., 69, 73, 74), the Circuit Court of Appeals said: "The assertion of the Appellants in their publications that 'they make the only piano made by a Chickering' is also deceiving, and its adoption immediately after the death of Mr. Geo. H. Chickering might well induce the belief that its use is intentionally designed to deceive and acquire for themselves the trade and good will of the Appellee. While the truth of the statement may be conceded, it is, as stated, only a half truth, conveying to the public the idea that the 'Chickering piano' known to the public was made by the Appellants and not by the Appellee."

In Reddaway *v.* Banham (1896), App. Cas. at p. 212, Lord Herschell said: "I rather demur, however, to the statement of James, L. J., that the defendent in Wotherspoon *v.* Currie (42 L. J., Ch. 130) was not telling a lie in calling his starch "Glenfield Starch," as I do to the view that the defendants in this case were telling the simple truth when they

sold their belting as camel hair belting. I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary meaning differing from its primary one, and that if it is used to persons in the trade who will understand it in its secondary sense, it will be none the less a falsehood that in its primary sense it may be true."

In the same case Lord Macnaghten said: "At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth."

So in this case when the appellant and its principal and their agents and dealers used the name "Remington"—which had acquired a secondary meaning—upon their machines and signs, and in their advertising media, they did that which was calculated to mislead and was intended to convey a false impression, and it was none the less a falsehood by reason of the fact that ~~the~~ Franklin Remington was connected with and had a *nominal* interest in the Remington-Sholes Company. In other words, *they used appellee's trade name as a designation for their product and business and not as the name of any individual.* They, also, adroitly sought to impress the mind of the public with the belief that they were the successors of E. Remington & Sons.

Ninth. In considering the question whether the court below erred in enjoining Howe Scale Co.'s use of the name "Remington" and the abbreviation "Rem" in connection with its machine and business, it is to be noted that the Court was not required to confine its attention simply, *to that which was stamped*

upon the machines, because in many cases of trade interference, wherein injunctions have been granted, the fraudulent trade names were used as descriptions of the defendants for *general* purposes, and in their advertisements, circulars, signs, etc.

Kelly on Trade-marks (2d Ed.), p. 491.

In the case at bar, appellants and their agents and dealers in offering for sale, advertising for sale and selling the so-called Rem-Sho machines, used, among others, the following names and words, to wit:

Remington-Sholes Typewriter.
Rem-Sho Typewriter.
Remington-Sholes Co.
REMEMBER the NAME.
The Remington-Sholes Standard Typewriter.
REM-SHO.
Remington-Sholes.
Standard Typewriter.
Remington Imperial.
Remington Typewriters * * * called,
Remington-Sholes.
Remington-Sholes,
New Model "Remington."
These Genuine Remingtons made by Remington-Sholes.
Rem-Sho Typewriter.
The only typewriter manufactured to-day by a REMINGTON.
* * * It represents the SECOND GENERATION of typewriter manufacturers bearing this great name.
The only machine made by a Remington is the new Remington-Sholes.
Rem-Sho Typewriter, the only machine now manufactured by Mr. Remington.
Mr. Franklin Remington, son and grandson of the old and celebrated American house, is the only member of that family now engaged in the manufacture of a typewriter * * *

In cases like that at bar, the action of the court extends to every kind of misrepresentation which is calculated to pass off the defendant's goods as the plaintiff's, and hence the court will consider all the badges of fraud connected with the offering for sale, advertising for sale, or sale of a defendant's goods.

Bearing in mind that the names "Remington Typewriter Co." and "Remington Standard Typewriter Co." had long been used in connection with appellee's business, and that the names "Remington," "Remington Typewriter" and "Remington Standard Typewriter," had been associated with its product long before appellants entered the typewriter field, it is manifest that the names used by appellants upon and in connection with the sale of their machines, were calculated to divert appellee's trade to appellants by confusing the identity of the products of both and lead purchasers to buy those of one for those of the other.

Said Judge Wallace in the Rogers case (70 Fed. Rep., 1019): "No person is permitted to use his own name in such a manner as to inflict an unnecessary injury upon another. The corporators chose the name (Rogers) unnecessarily and having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

THE NAME REMINGTON-SHOLES.

Counsel for Appellants stated in the court below that "to those familiar with the name Remington-Sholes Company, or having such name before them, the name Rem-Sho might, without any exercise of extraordinary cleverness, be considered to be an abbreviation of the name Remington-Sholes."

In another connection the learned counsel asserted that the "same mental act that converts 'Rem-Sho' into 'Remington-Sholes' brings at once to the

mind both names—'Remington' and 'Sholes',—and with both names thus before him there can be no possible excuse for any one confounding these two names with the single name Remington."

In answer to this contention the Circuit Court said: "Connecting the name 'Sholes' with 'Remington' in the business and on the machines would not or might not adequately indicate to a purchaser who had known or heard of the Remington typewriters, and wanted one, that these were not original Remingtons such as were wanted. The name, although linked with Sholes, would indicate Remington connection in typewriter production and imply the original manufacture."

The Court of Appeals, speaking by Judge Lacombe, referred to the use of the name Remington-Sholes by the appellants, their predecessors and the promoters thereof as follows: "They knew that the presence of that name (Remington) on the machine would be a constant temptation, often yielded to, by whomsoever sold one to the uninstructed purchaser, to represent that it was the 'real' or the 'improved' Remington; that the presence of the name made confusion easy; and that the results of any confusion would be entirely in their favor."

These statements of the courts below are entirely sustained by the evidence of Stallwood, Weingart and others. The appellants not only used the name "Remington-Sholes," but they "*garnished the use*" thereof by asserting in their advertisements, and catalogues, and by their agents and dealers that appellants' machine was "the only machine now made by a Remington," and "the only typewriter manufactured to-day by a Remington." That the Remington-Sholes machine represented "the second generation of typewriter manufacturers bearing this great name"—Remington. In their advertisements, etc., they printed the name "Remington" and the words "second generation" in bold faced capitals. These statements were constantly repeated

to the prospective purchaser by agents and dealers. The effect of all this was to impress upon the mind of the purchaser that "Remington" was the great and important name, and that the name "Sholes" was of little or no consequence. In other words their acts and words showed that the name "Remington" was the dominant and salient part of the name "Remington-Sholes." The purpose of these statements was to impress the mind of the public with the belief that the appellants' machine was "a Remington." Appellants in their instructions to their agents and dealers concerning the Remington-Sholes typewriter said: "The machine has now been fully explained and it remains with the salesman to add such other interesting facts, such as the history of the company, the connection of our Mr. Remington with this machine, and the relation (connection) to the old Remington Standard, the fact that this is the second generation of typewriter builders, and that the same standard of excellence is being maintained in the manufacture of this machine as all other goods which have been produced by the Remingtons." It will be observed that in these instructions to agents and dealers appellants referred to the *connection* of our Mr. Remington not only with the Remington-Sholes machine, but also his relation to "the old Remington Standard" machine. In other words, they associated in the minds of their agents and dealers Mr. Remington and the Remington-Sholes machine with appellee's product and business. The assertion that they are the *second generation* of typewriter builders and are maintaining *the same standard of excellence* in the manufacture of the Remington-Sholes machine *as in the case of all goods produced by the Remingtons*, clearly indicates *successorship, and that they have succeeded to the skill and excellence in typewriter manufacture that belonged to the old Remington concern whose lawful successor the appellee is.*

Furthermore, it is not to be forgotten that the name "Sholes," which was suffixed or added to the name Remington, tended rather to accentuate the connection of the Remington-Sholes Co. with appellee and its machine than to differentiate the same.

It appears in the record that the name Sholes had been associated with the earliest form of appellee's predecessor's machines, in consequence of one Sholes being one of the originators thereof.

The earliest model put on the market by E. Remington & Sons Corporation was designated "Sholes & Glidden." *No two names could have been selected from the vocabularies of the world which were so well calculated to divert and injure the good will of appellee's business as the names Remington-Sholes*, and that appellants *knew* this fact is shown by the *continual iteration* in their publications, and by word of mouth, that Mr. Sholes is the son of "the original inventor of the Remington Standard Typewriter," and that Mr. Remington is the "son of the original manufacturer of the well-known typewriter that bears his name."

We submit, therefore, that appellants' contention that by making use of the name "Sholes" it did that which tended to differentiate its product from that of appellee's cannot be maintained. On the contrary, the selection and use of the name "Sholes" tended rather to produce confusion in business than to prevent it.

DECISION OF THE GERMAN COURTS.

Tenth.—An alleged decision of the German courts was pleaded as a defense by appellants (R., pp. 29, 30, Sub-division XII), but it was not introduced in evidence or any proof made in respect thereto. The appellants gave notice upon the record that at the hearing of the cause they would refer to said decision. *It is scarcely necessary to say that allegations*

without proofs requisite to support them are wholly unavailing.

The action was a civil proceeding by the firm of Glogowski & Co., of Berlin, against one Henry Newald of the same city, under the **Civil Code** and **Trade-mark Laws** of the German Empire. At the time the action was prosecuted, Glogowski & Co. were the exclusive resident dealers for Germany of appellee's machines, and Newald was a dealer, selling the so-called "Remington-Sholes" machine in Germany. Glogowski & Co., being the resident dealers of appellee's machines, had under the German Trade-mark law registered the name "Remington" as a trade-mark for the goods they were selling. Newald was selling the machines of the "Remington-Sholes Typewriter Company" with the name of that concern upon them.

It was an affidavit case ; that is to say, no witnesses were examined in court or depositions taken in the usual manner, nor were any of the affiants cross-examined. The consequence was that while the *plaintiff's* case was meagerly and imperfectly presented, the defendant Newald was furnished with sundry affidavits by the Remington-Sholes Typewriter Company, which not only stoutly denied the plaintiff's right to use the name "Remington," upon or in connection with the sale of their machines, but also contained many gross misstatements of fact. The court ultimately came to the conclusion that inasmuch as the defendant Newald dealt exclusively in the goods of an American firm, which had the name "Remington-Sholes Typewriter Company" upon them, he could not, under the *special provisions of the German Trade-mark Law, and in view of the Convention between the German Empire and the United States*, be prevented from selling the typewriting machines of the so-called American firm, "Remington-Sholes Typewriter Company," in Germany. Obviously the *parties* to that proceeding, the *issues* therein, and the *law* applicable thereto were *totally* different from those in the case at bar.

The decision of the Court in that case cannot avail the appellants as an authority here.

First, because the question there was one which arose under the Trade-mark Laws of *Germany*, which are wholly unlike those of this country. *Second*, because no such state of facts was presented in that case as is disclosed in the case at bar. *Third*, because it has been decided by the courts in this country that an adjudication in *Germany*, like that set forth in appellants' answer, is of no force here, for the reason that *foreign* adjudications, *as respects torts*, are not binding upon the courts in this country, and the granting of an injunction depends upon circumstances which vary in different jurisdictions; and *lastly* because the parties in the *German* case were other and different from those in this action.

Wharton's Conflict of Laws, Secs. 793, 827; Hohner *v.* Gratz, 50 Fed. Rep., 369; City of Carlsbad *v.* Kutnow, 68 Fed. Rep., 794; S. C. App., 71 Fed. Rep., 167.

INJUNCTION.

Appellants' counsel in the courts below asserted that the injunctive portion of the decree was too broad, in that it restrained the Howe Scale Company from the use of the personal name "Remington."

It must not be overlooked in this case that the injunction only went against the Howe Scale Company, which in its own right made no claim to the word "Remington," and at the time the injunction was issued had permanently retired from the typewriter business. No injunction has in fact been issued against the Remington-Sholes Co. (now Fay-Sholes Co.)

It is scarcely necessary to point out that neither

Franklin Remington nor any other *individual* of the name Remington has been enjoined from using his own name in his own business. Both the Howe Scale Company and the Remington-Sholes Company, are artificial persons, and the name "Remington-Sholes" as used by them, to quote the words of the learned L. J., in Valentine Meat Juice Co. case (British Ct. App. 17 R. P. C., 684), "was not the name of any man. It was an artificial name, invented for a purpose." The Court below having reached the conclusion that the name "Remington" had been intentionally selected, *malo animo*, in order to compete with the appellee and to divert its trade to appellants by confusing the identity of the products of both to the injury of appellee, and was being used for that purpose, was correct in suppressing such fraudulent use. In the following cases an injunction similar in form to that of the case at bar was awarded.

Montgomery *v.* Thompson, 41 Ch. Div. 35 on appeal (1891) App. Cas., 217.

Wotherspoon *v.* Currie L. R. 5 H. L., 508. Valentine Meat Juice Co. Ltd. *v.* Valentine Extract Co., Ltd. and others, 17 R. P. C. British Ct. App., 673, 688. S. C. L. T. N. S., 271.

Pinet *v.* Maison Louis Pinet, 15 R. P. C., 65, 67 L. J. Ch., 41.

Newman *v.* Alvord, 51 N. Y., 189, 195.

Garrett *v.* T. H. Garret & Co., 78 Fed. Rep., 472. Clark Thread Co. *v.* Armitage, 67 Fed Rep., 896. S. C., 74 Fed. Rep., 936. Rogers Co. *v.* Rogers Mfg. Co., 70 Fed. Rep., 1017, and many other similar cases.

SALES OF APPELLANTS' MACHINES.

Appellants efforts to pirate the good-will of appellee's business were successful, and the use of the name Remington, both in the corporate name and as a designation, or a part of a designation for appellants' machines was properly enjoined.

I. Howe Scale Co. adverti-ed for sale, and sold the so-called Remington-Sholes typewriter prior and subsequent to the filing of the bill of complaint herein. The bill alleges that after the first day of May, A. D. 1897, and before the filing thereof, the defendant advertised for sale, offered for sale and sold a large number of typewriting machines in the State of Vermont and in the cities of Chicago, Ill., Boston, Mass., Portland, Ore., Kansas City, Mo., New York, N. Y., Baltimore, Md., Pittsburg, Pa., Cincinnati, O., San Francisco, Cal., Philadelphia, Pa., Minneapolis, Minn., Cleveland, O., St. Louis, Mo., Los Angeles, Cal., and that it continues to advertise for sale and to sell such machines under the name of and by the designation "Remington-Sholes" and "Rem Sho" typewriter.

R., pp. 8, 9.

This allegation of the bill is admitted in appellants' answer.

R., pp. 27, 28.

In addition to the above admission contained in their answer, it appears from the evidence of sundry witnesses that appellants sold these machines through their sales offices in various cities and localities in the United States.

Mr. Scorer, one of their sales agents, stated that during the time he was engaged in the sale of the "Remington-Sholes" typewriter in Pittsburg and vicinity, *the appellants sold about ninety machines from $67.50 up to $85.50.* He was instructed to

accept a reasonable price and he understood that to mean a price equal to $60 net.

R., p. 351.

It appears from the evidence of appellants' witnesses, **Williams** (R., pp. 1221, 1222), **MacNaugher** (R., p. 1228) and **Beitel** (R., p. 1237), that sales of said machines were made at the appellants' *Pittsburg* office.

The evidence of **Trenholm** (R., pp. 1262, 1263, 1271), **Parker** (R., pp. 1279, 1284, 1285) and **Hatch** (R., pp. 1051, 1059, 1064, 1065, 1066), shows that sales of said machines were made by appellants in *the City of New York* and elsewhere.

Sales were also made at the *Philadelphia* office of appellants as appears by the evidence of **Romig** (R., p. 1123) and **Wilgus** (1339, 1343).

Complainant's Exhibit Seddon-Romig Letter (R., pp. 971, 972), also shows that the appellants had, theretofore, *sold the United States Government one hundred and thirty machines;* that they were supplying machines to their *foreign* representatives, and had secured some of appellee's *foreign* agents.

At the *Baltimore* office it appears from the testimony of Gillelan that the **"Tribune Cycle Company"** was representing appellants in the sale of the "Remington-Sholes" or "Rem-Sho" typewriter (R., pp. 1327, 1334, 1336), and that *thirty or forty machines were sold for use in and about Baltimore.* It appears from the evidence of appellants' witness **Hobbs**, that large sales of appellants' machines were made in *the City of Chicago* (R., pp. 1099, 1100), and from the evidence of appellants' witness **Baldwin** (R., pp. 1023, 1024 *et seq.*), and that of **Hatch** (R., pp. 1077, 1078), that *dealerships and agencies* were established in many cities and towns in the United States where appellants' machines were sold. Machines were also sold in the city of Washington. This is shown by

Complainant's Exhibit, Seddon-Romig Letter, and by the testimony of **Frank L. Sholes** and others.

Appellants' agent and manager, **Seddon,** stated to Scheumaker that he had sold a number of "Remington-Sholes" machines in the Eastern States, and had secured appellee's agents in several localities.

R., pp. 173, 174.

From the evidence of **Hobbs,** who was the Chicago manager of the "Remington-Sholes Company," it appears that the "*Remington-Sholes*" *machines were sold as low as $60.00,* and the same fact is stated in the deposition of the witness **Scorer** and others.

R., pp. 555, 559.

It will be observed that the appellants had entered with energy into fields and districts where appellee's machine had for many years been largely sold and used, and had sold their machines at a much lower price than appellee sold its typewriters. By selling its machines at a lower price than appellee did, the appellants were enabled to offer *extra inducements to agents and dealers as regards prices,* and thereby the appellee's machines were displaced and its business was injured. Appellants sold their typewriters, with the *simulated name* and designation upon them, to their agents and dealers *at a price below* that for which the *genuine* product of the appellee could be purchased. They thus appealed to the greed of their customers to buy their machines at *a less price* than appellee's product could be obtained, and having appellee's trade-name and designation—"Remington"—thereon, appellants' machines were palmed off by its dealers as and for the *genuine* Remington, or the *new and improved* Remington typewriter.

Pillsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 Fed. Rep., 841, 849.

It goes without saying, that a *new* typewriting machine could only with great difficulty and after years of effort, be expected to compete, successfully, with the old and favorably known typewriter manufactured and sold by appellee, everywhere *known as the "Remington" and "Remington typewriter." But appellants, by stamping appellee's trade-name and designation upon their machines, and selling them at a less price than appellee's* were sold, and by representing their machines as the *genuine Remington, the new and improved Remington, and the only machine made by a Remington, etc., were enabled to compete successfully with appellee, and to displace its machines in localities and districts whevein they had been largely sold and used.*

There is no doubt that the appellee sustained very *substantial* loss and damages in consequence of the acts of appellants; but even if this were not the fact, the appellee was, nevertheless, entitled to relief in this case.

In Reddaway *v.* Bentham Co., 2 Q. B., 639, the English Court of Appeal, through Lopes, *L. J.*, said: "If an article has acquired a *distinctive* meaning in the trade, connecting it with a *particular* person's manufacture, *and another so advertises or describes or makes up his goods, as to lead purchasers to believe,* or *to create probability of their believing that they are buying the goods of the former, when in fact they are buying the goods of the latter, and this, though there is no intention to defraud and no special damage proved, a Court of Equity will grant relief by way of injunction.*"

To the same effect Rahtjen's American Composition Company *v.* Holzappel's Comp. Company, 101 Fed. Rep., 257; Oxford University *v.* Wilmore-Andrews Publishing Company, 101 Fed. Rep., 443.

OPINION OF JUDGE WALLACE.

There was no conflict of opinion in this case between the judges of the courts below in respect *of matters of law.*

The dissent of Judge Wallace was based solely on questions of fact. He did not dissent from any proposition of law enunciated in the majority opinion of the Court of Appeals. In fact the learned Judge had already, in the Rogers case, (70 F. R., 1019) enunciated the proposition quoted and applied in the prevailing opinion herein.

In his opinion Judge Wallace admits that "doubtless some careless purchasers have been misled and some unscrupulous dealers have traded on the resemblance imparted by the word Remington." . . . . . That "if the defendant had selected its name for the purpose of unfair competition in trade with the Complainant the question whether the collocation of the word Remington with other words did not suffice to distinguish its name from the Complainant's name would be of little importance." . . . . . And again when speaking of the right of Franklin Remington to use his own name in the corporate designation, "Remington-Sholes Typewriter Co." he qualifies such right to use the same with the limitation, "provided it is (was) not chosen as a cover for unfair competition."

The learned Judge, also, apparently overlooked the fact that the appellee's predecessors acquired the *whole typewriter business of E. Remington & Sons Corporation*, including the good-will, trade-names and trade-marks used in connection with the manufacture and sale of the Remington typewriting machines.

He also apparently overlooked the fact that appellee's predecessor registered the name "Remington" in the United States Patent Office, that it used the name "Remington" conspicuously upon the paper table of its machines, and that its ma-

chines were advertised, designated and sold as the Remington, and long prior to the organization of the Remington-Sholes Typewriter Co. had become generally known as the Remington Typewriter.

Judge Wallace also appears to have overlooked the fact that the evidence in this case establishes the fact that the ordinary purchaser of writing machines relies upon the name "Remington" which has been so long and exclusively identified with appellee's business as to inform the public that the name upon typewriters means that they are the product of the old Remington factory and of appellee, and that the ordinary buyer of typewriters is unacquainted with the external appearance and physical characteristics of the machines, and in purchasing relies upon the name and repute of the machine which he desires to purchase.

The learned Judge, also, seems to have erroneously found that the Remington-Sholes Typewriter Co. was the *successor* in business of another concern of which the Remingtons and Sholes were the owners.

This finding or statement of fact could only refer to "The Z. G. Sholes Co.," which appellants assert *never made or sold any typewriting machines or had any business*, and this contention is in accordance with the majority opinion of the Circuit Court of Appeals, wherein it is said that "prior to the formation of the Remington-Sholes Typewriter Co. no machines had been sold or offered for sale. Two or more had been made as models, and the name was then changed from 'Z. G. Sholes' to 'Remington-Sholes,' but the new name had not become associated with the machine except in the talk of the future corporators among themselves; the public knew nothing of any such name in connection with a typewriter, indeed did not know the junior Remingtons or even Sholes as a producer of typewriters."

Furthermore, Judge Wallace also appears to have erroneously found that the machines had been introduced to the public prior to the organization of the Remington-Sholes Typewriter Co., for he says that it was natural that those who had invented the machine and given all their time and means *in introducing it to the public* when they came to organize a corporation, ... should choose their own name as a corporate name."

The machine was not introduced to the public prior to December, 1894, and perhaps not till later.

R., pp. 410, 1110.

Manifestly Judge Wallace misapprehended or did not become fully possessed of the facts and circumstances disclosed by the record in this case or he would undoubtedly have reached the same conclusion that he did in the Rogers case (70 Fed. Rep., 1017, 1019), wherein Judge Shipman found and said: "In this case Rogers helped to establish a corporation which took his name for the purpose of inducing the public to think that they were buying the well-known Rogers goods, and for the purpose of surreptitiously obtaining the advantage of the good reputation which other manufacturers had given to articles stamped with that name." In this same case Judge Wallace found that "The corporators chose the name unnecessarily, and, having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of Complainant." In the case at bar Judge Coxe concurred in the conclusion reached by Judge Lacombe for the reason that he was unable to distinguish this cause from Rogers *v.* Rogers (70 Fed. Rep., 1017) and therefore found as did Judge Lacombe that there was "a tricky, dishonest and fraudulent use" of the name Remington, and that the corporators, Remington, Sholes, Fay and Head, chose the name Remington unnecessarily, and did so for the purpose of unfair competition.

CASES CITED BY APPELLANTS.

(A.) It is alleged that the decision of the Circuit Court of Appeals of the second circuit in the case of National Starch Mfg. Co. *vs.* Duryea (79 Fed. Rep., 651, 101 F. R., 117) is in conflict with the decision of the Court in the case at bar.

In the Duryea case it appeared that Duryea & Co. was a firm, composed of two sons of Hiram Duryea, one of the original founders of the Duryea Starch business and two other persons, and that Hiram Duryea furnished *all* the capital for the firm. It also appeared that Hiram Duryea, during the progress of the suit and before the case came to final hearing, acquired the ownership of the *entire* business.

It was conceded by plaintiff that Hiram Duryea had a right to enter directly or indirectly into the starch business at the time of the commencement of the action, and had a right to permit his name to be used in the new enterprise.

The evidence in the case showed that the defendants simply used the name Duryea & Company, and had not in any way *garnished* the use thereof. They had simply designated their starch "Laundry Starch" and "Pure Corn Flour" prepared by Duryea & Co, and had never used the word "Duryea" *as a designation or part of a designation for their goods.* On the appeal from the order granting an injunction *pendente lite* (79 Fed. Rep., 652) the Court said:

"It cannot be denied that by continuous and rightful use for forty years, the name Duryea's Starch" had become identified with its source of manufacture, and that an attempt by persons by the name of Duryea, or of any other name, to put upon the market their own product under the name "Duryea Starch" could be suppressed.

Inasmuch as defendants have not called their starch by this well known name, and have not simulated the labels on their packages to those long

used by the manufacturer at Glen Cove, the question is whether the defendants have made such an unnecessary and unfair use of the name of Duryea as to deserve the unfavorable criticism of a Court of Equity."

The Court held that defendants had not made an unfair use of the name "Duryea" and should not be enjoined.

In the case of Walter Baker & Co., *vs.* Sanders, 80 Fed. Rep., 889, 895, the Court of Appeals of the Second Circuit referred to and distinguished the Duryea case from the Baker case, and held that the defendant might not use the surname Baker so as to announce upon labels and advertisements that the goods he sold were "Baker's Chocolate."

(B.) The case of Baker *vs.* Baker, 115 Fed. Rep., 297, 300, a decision by the Court of Appeals of the Second Circuit, is referred to. In its facts that case is clearly distinguishable from the case at bar. The defendant was a corporation of the name "Wm. H. Baker."

The Court said, "If the name had been selected unnecessarily and for the purpose of illegitimate competition with Complainant, we should not hesitate to enjoin it . . . . . but it was selected without any element of bad faith or unfair use, it was not a new name, and it represented a widely known concern engaged in a large business, which had acquired a valuable good-will. For reasons of convenience the owner concluded to reorganize the concern as a corporation and desiring to preserve the good-will, he chose the name with which the good-will was identified. He intended to remain the owner of the concern and has remained its owner as before.

As regards the Complainant, it is wholly immaterial whether the business is conducted as the name of a corporation, or that of an individual, by the same description."

This was simply the case of an *individual* who had traded under his own name, Wm. H. Baker,

and organized a corporation to carry on his own business under his own name. Manifestly there is no conflict between the Duryea and Baker cases and the case at bar. In the Baker case the defendant did not designate its goods as "Baker's Chocolate," but had adopted as a trade-mark the words "Justice Brand" and a figure of justice, and had otherwise differentiated its product from complainants'.

In the case at bar the proofs show that the Remington-Sholes Co. had adopted and was using not the name of any individual but an artificial name invented for a purpose: that the corporation was organized by a body of assosiates in which Franklin Remington had only one-twentieth interest; that is, owned 150 out of 3,000 shares of capital stock, and that the Remingtons had no prior skill in or knowledge of the typewriter business and were unknown to the public in connection with that industry. The proofs further show that the appellants had designated and advertised their machines as the "Remington-Sholes" typewriter, that they had used the name "Remington" both in their corporate name and upon their machines, and garnished the use of the name Remington in their advertisements and by word of mouth, in such a way as to lead the public to believe that their product had been made by the Remington Company, (Appellee's predecessor), whose name was a by-word for good workmanship the world over, and that the Remington-Sholes Co. was either the successor or a branch of the old Remington concern.

(C.) The case of American Cereal Co. *vs.* Eli Pettijohn Cereal Co. (72 Fed. Rep., 903, affirmed 76 Fed. Rep., 372), decided by the 7th circuit, is cited by Appellants (p. 27). In that case a preliminary injunction was granted which on motion of defendant was dissolved. The product in question was first manufactured and put upon the market by one Eli Pettijohn, defendant's predecessor in business, and

one of the organizers and incorporators of Defendant Co., under the name "Pettijohn Rolled Wheat." Prior to the organization of the Defendant Company it was sold under various names by Eli Pettijohn and his son, or by one of them as:

"Pettijohn Breakfast Gems."
"Pettijohn Breakfast Pearls."
"Pettijohn Breakfast Food."

The name "Pettijohn" was first associated with the product by Eli Pettijohn (the father), who was engaged in the manufacture and sale of the product in the State of California for about fifteen years. During all of these years, the name "Pettijohn" was applied to this product, whether manufactured by the father or the son, or by the successors of both or either of them. The plaintiff claimed the title to the name as applied to this product through grant by the son, and the defendant through grant by the father. It being doubtful whether the father ever parted with his right to such use to his name, and whether the son ever acquired the *exclusive* use thereof, in the manufacture and sale of the breakfast food, and whether they were not both entitled to use the name Pettijohn as tenants in common, the Court of Appeals held that the complainant's title to the name was not sufficiently clear to warrant the issuance of a preliminary injunction. It is manifest that in this case the right and title of the defendant to use the name Eli Pettijohn was as good, if not better, than that of the plaintiff. The evidence in that case showed that Eli Pettijohn was the originator and *pioneer* in the manufacture and sale of "Pettijohn Breakfast Food," and that at the time of the organization of defendant corporation, he had an established business and good will that had been carried on by him for upwards of fifteen years. He caused a corporation to be organized to take over and carry on this *existing business* in which he continued to be

actively engaged. To this corporation he gave his full name, "Eli Pettijohn."

Manifestly these facts plainly distinguish this case from the case at bar.

(D.) The paragraph in the opinion of Mr. Justice Bradley in Celluloid Mfg. Co. *v.* Cellonite Mfg. Co. (32 F. R., 94) from which the excerpt in Petitioner's Brief is quoted (p. 25) reads as follows:

"As to the imitation of the Complainant's name. The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the name of private firms or partnerships. The defendant's name was of its own chosing, and, if an unlawful imitation of the Complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the Complainant's name. That would be too gross an invasion of the Complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name "Cellonite Manufacturing Company" is sufficiently similar to that of the "Celluloid Manufacturing Company" to amount to an infringement of the Complainant's trade-name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead."

The learned Justice in determining the question whether the defendant's name was a simulated one, which was obnoxious to equity, applied the test of "a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer."

But he pointed out what similarity was sufficient, "*has to be determined in each case by its own circumstances.*"

It is not seen that there is any conflict between the proposition quoted from the opinion of Justice Bradley, in the case cited, and any proposition enunciated or held by the Court of Appeals in the case at bar.

(E.) In the case of Continental Insurance Co. *v.* Continental Fire Ass'n (96 F. R., 846, affd. 101 Fed. R., 255, Referred to in Petitioner's Brief, p. 29), the Court held that the word "Continental" being a geographical term was *publici juris*, and that the Complainant could acquire no exclusive right to the use thereof. There being an absence of proof of any fraudulent intent or conduct on the part of the defendant, or that the public had been deceived by any similarity between the names, a preliminary injunction was refused. It is to be noted that in this case the Court recognized the familiar rule that **"Relief by injunction is sometimes granted in cases where the party enjoined is using as a trade-name a term which is geographical or descriptive in character, and, therefore, could not be exclusively appropriated by the party securing relief."**

The Court pointed out that relief is granted in this class of cases not because the complainant had the *exclusive right* to appropriate the word or term, but because the defendant had fraudulently and deceitfully adopted the words, and methods of use, with the purpose and intention of attracting customers away from his rival to himself.

The foregoing authorities are all those decided by the U. S. Circuit Courts, which it is alleged are in

conflict with the decisions of the Court in this case or with one another.

It is submitted that a careful examination of these cases fails to disclose any lack of harmony among them in respect of the legal principals therein involved.

The other cases cited by the learned counsel for appellants, as in conflict with the decisions in the case at bar, are decisions of sundry State Courts.

(F) The case of Meneely *v.* Meneely (1 Hun., 673, affirmed 62 N. Y., 427) decided by the Supreme Court and Court of Appeals of N. Y. State, has been pressed upon the attention of the Court here as an authority repugnant to the decisions. In that case the defendants, Clinton H. Meneely and Geo. H. Kimberly were sued jointly as partners trading under the firm name of Meneely & Kimberly. The Court below issued an injunction which prohibited the use by defendant Clinton H. Meneely of his name *in any way*.

The Court found that defendants had not used, in business, the firm name or any part of the name by which the plaintiffs had theretofore been known to the public, nor had defendants designated their product as "Meneely Bells" or "Meneely-Kimberly Bells"; nor had there been any attempt by any act or artifice to appropriate the good will of the old business to which plaintiffs had succeeded. On this state of facts the Court of Appeals held (1) that the injunction granted by the Court below was too broad in that it enjoined Clinton H. Meneely, an individual, from using his patronymic "*in any way*," and (2) there being no evidence that defendants had resorted to any artifice or contrivance to produce the belief or make it appear that the establishment of the defendants was that of plaintiffs, or connected therewith, an injunction *was unwarranted*.

This case is referred to by the N. Y. Court of Appeals in Chas. S. Higgins Co. *v.* Higgins Soap Co., 144 N. Y., 462, as an authority upon the propo-

sition that any person may use in his business his family name, provided he uses it honestly and without artifice or deception; but that Court did not find anything in the Meneely case that was in conflict with any of the propositions enunciated or the conclusions reached in the Higgins case.

Anything stated in the opinions in the Meneely case from which an inference could be drawn in conflict with the decision there, must be regarded as overruled by the Higgins case.

(G) Two other N. Y. cases are referred to—The Scott Stamp & Coin Co., Ltd. *v.* T. W. Scott Co., Ltd. (15 N. Y. Supp., 325), and Employers, Etc. Co. *v.* Employers Etc. Co., 10 N. Y. Supp., 845.

These cases are so clearly distinguishable in their facts from the case at bar that it is not deemed necessary to trespass upon the time of this Court to discuss them in detail.

Suffice it to say that both of these New York cases were decided long prior to the Higgins case (*supra*), and the De Long cases (32 N. Y. Supp., 203; aff. 35 N. Y. Supp., 509), and hence any expressions of opinion therein that are in conflict with any legal conclusions reached in the De Long and Higgins cases must be regarded as overruled.

(H) The case of S. Chivers & Sons *v.* Chivers & Co., Ltd., 25 Trade Mark Red., 289 (cited by Appellants, p. 30), is wholly unlike the case before the Court here. An examination of the facts in that case will disclose (1) that the plaintiff failed to establish that the name "Chivers" had acquired a *secondary* meaning in the trade as denoting the plaintiff's jellies, (2) that the defendant was the successor in business of an *old concern* which had been long engaged in the jam trade (of which jellies was a by-product), under the name S. Chivers & Co., and (3) that defendant had not designated its product as "Chiver's Jellies," and had resorted to no artifice or act calculated to produce confusion in the

mind of the public (see Kerly on Trade-Marks, 2d Edition, pp. 506–7).

(I) Another case referred to in Appellants' Brief (p. 27) is Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co. (142 Ill., 494) decided by the Supreme Court of Illinois.

The facts in that case are not anologous to the case at bar, and the doctrine of that case, as was clearly pointed out by the learned Court of Appeals of Seventh Circuit in the Peck Bros. case (113 F. R., 291, at pp. 299–302), is not in accord with the decisions of the Federal and other State Courts.

(J). The counsel for the defendant-appellants earnestly argued in their brief in the court below, that the decision in this case was in conflict with that of this court in the case of Goodyear Company *v.* Goodyear Rubber Co. (128 U. S., 598). An examination of the Goodyear case will disclose that it has no application to the state of facts existing here. The suit was instituted by the Goodyear Rubber Company, a corporation organized *in 1872* against the Goodyear India Rubber Glove Manufacturing Company. The defendant appeared and filed a cross bill claiming that it was prior to and had the exclusive right to designate its goods by the term "Goodyear Rubber." It appeared by proofs that the defendant was organized as a corporation under the name, in Connecticut *in 1847*, for the purpose of manufacturing India Rubber goods, and in 1849 obtained license for their manufacture under patents of Chas. Goodyear, and continued in that business during the existence of those patents, and that after their expiration in 1865 and continuously since, it had manufactured and sold very largely all kinds and classes of india rubber goods treated according to the patents of Goodyear (page 600-1).

It also appeared that the names "Goodyear Rubber" did not indicate in the trade, a particular

manufacturer, but *were terms descriptive of goods produced by a process known as Goodyear's invention.* On this state of facts the court held (first), that if any exclusive right to the name existed, that right would seem to belong to the defendant rather than to the plaintiff, but (second), that as the words Goodyear Rubber indicated in the trade goods manufactured according to a particular process covered by patents which had expired, that these words had become *publici juris*, and could not be exclusively appropriated by any one.

In the course of the opinion written by Mr. Justice Field it is said:

> "The proofs in the case show very clearly "that Goodyear's India Rubber Glove Manufac- "turing Company had, as alleged in its answer, "been for many years in the use of abbreviations "in the designation of its company, using some- "times a name similar to the corporate name of "the plaintiff; and if any exclusive right to the "abbreviated name were to follow from its pro- "tracted use, that right would seem to belong to "that company rather than to the plaintiff. "But the name of 'Goodyear Rubber Com- "pany' is not capable of exclusive appro- "priation. 'Goodyear Rubber' are terms "descriptive of well-known classes of goods "produced by the process known Goodyear's "invention. Names which are thus descriptive "of a class of goods cannot be exclusively ap- "propriated by any one."

We submit that the decision has no bearing upon the case here, where it is shown that the name "Remington" has *acquired a secondary meaning in the trade as designating the product, good-will and business of the complainant-appellee.*

The Goodyear case is analogous to the case of the Canal Co. *v.* Clarke, 13 Wall, 311, a similar case where the words sought to be appropriated were

words in common use having no other signification than there ordinary one and not pointing to any particular manufacturer or business.

(K.) Finally the case of Monarch *v.* Rosenfeld, et al., 39 So. W. Rep., 236, was referred to by the defendants-appellants, and excerpts from the opinion in that case were quoted in the brief below. While apart from the facts some observations of the Court may seem to support appellants' argument here, yet when read in the light of the facts they are seen to have no bearing. A suit had been instituted against S. I. Monarch to enjoin him from using his name in connection with the sale of whisky and an *injunction had been issued enjoining him from using the name of Monarch so as to deceive purchasers or cause confusion with the plaintiff's goods.*

It was alleged that he had violated this injunction and a motion was made to punish him for contempt. The alleged violation consisted in his selling goods manufactured under a contract with the Rock Spring Distilling Co., which goods were marked with the name S. I. Monarch, and the Court, in interpreting the decree of the Court below, held that as the defendant Monarch was simply enjoined from using his name in business in such a manner as to cause deception and as no proof was shown that he was using his name in a deceptive manner he was not in contempt. The mere fact that he did not manufacture the goods personally but had them manufactured for him under the contract with a corporation in which he was interested was not a violation of the injunction.

All the cases relied on by the defendants-appellants in the Courts below are clearly distinguishable from the case at bar.

We submit that there is no doubt that when the Remington-Sholes Company and its predecessor entered the typewriter field appellee had a world-wide reputation, which had accrued and was established through the manufacture and sale of the Remington typewriter.

There is no doubt that the purpose of the promoters and organizers of the Illinois corporations was to borrow the name of persons, who were unknown and unskilled in the typewriter business, to personate the name of a concern and a machine that were famous in that business.

There is no doubt that the selection of the name "Remington-Sholes" was an "intelligent" choice, and one that naturally suggested to the ordinary unsuspecting purchaser that appellants' product had been made by the "Remington concern," whose name was a "by-word for good workmanship the world over."

There is no doubt that the promoters and organizers of the corporations *knew* when they selected that name that its presence on their machines "would be a constant temptation, often yielded to by whomsoever sold one to the uninstructed purchaser, to represent that it was the 'real' or the 'improved' Remington; that the presence of the name made confusion easy; and that the results of any confusion would be entirely in their favor."

There is no doubt that the appellants, their predecessor, and their agents and so-called dealers represented to the public, both in advertisements and by word of mouth, that the Remington-Sholes machine was the "new and improved Remington," and that it was a "genuine Remington"; that it was the only machine then made by a Remington; that it represented the second generation of typewriter manufacturers bearing this great name, Remington, and that the same standard of excellence was being maintained in the manufacture of their machines as all other goods which were produced by the Remingtons.

There is no doubt that their purpose was to impress upon the public the belief that their business was a continuation of the character and business of the original Remington concern, whose typewriter business appellee succeeded to, and also to cause the public to believe that their machine was "a Remington."

There is no doubt that appellants and their predecessor sought, in many ways and in many connections, to associate their machines and business with appellee's and it predecessor's machines and business, thereby "unfairly stealing away another's business and good will." (32 Fed., Rep. 97).

The decree of the Court of Appeals in favor of appellee, so far as the decree was rendered, should be affirmed, but the cause should be remanded to the court below, with instructions to enter a decree which shall also enjoin against the use of the abbreviated name "Rem-Sho."

EDMUND WETMORE,
HENRY D. DONNELLY,
WILLIAM W. DODGE,
ARCHIBALD COX.

Supreme Court of the United States

OCTOBER TERM, [illegible]

[illegible]

[illegible]

Howe Scale Company of 1906 and Tri-Section Company,
Defendants-Appellants,

v.

Wyckoff, Seamans & Benedict,
Complainant-Appellee.

No. 730

Brief of Appellants for Contempt Appeal on Appeal from Order Denying Motion to Dismiss Appellee's Bill of Complaint Filed

[illegible]

Supreme Court of the United States,

OCTOBER TERM, 1904.

HOWE SCALE COMPANY of 1886 and FAY SHOLES COMPANY,
Defendants-Appellants,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Complainant-Appellee.

No. 130.

BRIEF FOR APPELLEE ON MOTION TO SUPPRESS.

No error can be predicated on the denial by the lower court of defendant's motion to expunge from the record certain testimony alleged to be objectionable, or to tax the costs thereof against complainant.

STATEMENT.

During the taking of the *prima facie* and rebutting proofs in this cause, divers objections were made by defendant to evidence introduced by complainant; and, at final hearing, a motion was made by defendant that these portions of the depositions "be suppressed or stricken from the record for the reasons stated in the objections upon the record" (pp. 1440–1443).

The motion was overruled (p. 1496) and this was one of the alleged errors specified in the Assignment of Errors below (see Eighth Assignment, pp. 1511–12) and in the petition for the writ of certiorari to this Court (Petition, p. 17).

It may be convenient to give in advance a

SYNOPSIS OF ARGUMENT

in regard to this motion.

Complainant contends that:

(A) Under the prevailing equity practice the Court below had no power to strike from the record testimony taken before the Examiner under objection.

(B) On an appeal in an equity cause, no reversal will be had for the admission of incompetent evidence, *provided there is, in the record, sufficient other competent evidence to sustain the decree.*

(C) That the evidence sought to be suppressed was both competent and material, and

(D) No motion was made to tax the costs against complainant.

Let us examine these seriatim:

(A) Under the prevailing equity practice the Court below had no power to strike from the record or to suppress testimony taken before the Examiner under objection.

The testimony objected to had to come here upon this appeal as part of the record. It might be disregarded as immaterial or otherwise incompetent, but it could not be stricken from the record.

Blease *v.* Garlington, 92 U. S. *1*

The practice outlined in this case by the Supreme Court has been uniformly followed in the Circuit and District Courts. See Appelton *v.* Ecaubert, 45 Fed. Rep., 281. Parisian Comb Co. *v.* Eschwege, 92 F. R., 721. Fayerweather *v.* Rich, 89 F. R., 529.

MacWilliam *v.* Webb Co., 119 F. R , 509. *In re* Lipset, 119 F. R., 379. *In re* Gottardi, 114 F. R., 328. Adee *v.* Iron Works, 46 F. R., 39. Lloyd *v.* Pennie, 50 F. R., 4. Ammunition Co. *v.* Firearms Co., 103 F. R., 39.

A corollary to the above proposition is that—

(B) On an appeal in an equity cause in the United States Courts no reversal will be predicated on the admission of incompetent or imm - terial evidence, provided there is in the record sufficient other competent evidence to sustain the decree.

Ruckman *v.* Cory,, 129 U. S., 387.
Gorham Mfg, Co. *v.* Dry Goods Co., 104 Fed. Rep., 243.

The purpose of the rule is that the Appelate Court rejecting incompetent testimony, even though considered below, and considering competent testimony, even though rejected below, may render such final decree as the equities of the case require.

In fact, defendant's counsel frankly conceded this in his brief in the Court of Appeals (p. 17).

To quote his words, "all that can be accomplished by a motion of this character is to direct attention to the objections."

Without more, we might safely rely on these well settled rules in equity cases as a complete answer to the alleged error in respect to the denial of this motion.

But aside from this, we submit that

(C) The evidence sought to be suppressed and stricken from the record by the defendant's motion was both relevant and competent.

The notice of motion covers such a quantity of testimony and multiplicity of subjects that it will be impossible to consider all the objections in detail.

In reading the testimony this Court will be in a position to pass upon the propriety thereof, as they arise.

In view, however, of the fact that the motion is an attempt to emphasize defendant's objections to portions of the testimony, dealing with certain subject matters, it will be advisable to refer to same.

DEFENDANT'S MOTION.

Defendant subdivided its notice of motion into five paragraphs.

Broadly, it was sought to strike from the record thereby testimony having reference to the following subject matters :

(1.) The testimony and exhibits relating to the formation of "The Z. G. Sholes Company" and the machine designated "The Z. G. Sholes" (Subdiv. 1, Rec., p. 1440).

(2.) Certain testimony offered by complainant *on rebuttal*, tending to show confusion in the trade, and also establishing the character of the purchasers and ~~consumers~~ users of typewriting machines, and their unfamiliarity with the structure, operation or physical characteristics of such machines.

Subdiv. 2, p. 1441.

(3.) Certain testimony relating to the acts, statements, advertisements and manner of doing business of the Remington-Sholes Co. and its agents, dealers and middlemen in the sale of machines in foreign countries, including Russia, France, Germany, Denmark and Canada.

Subdiv. 3, 4, and 5, p. 1441–2.

Let us examine these in the order named :

(1.) The evidence relating to the "Z. G. Sholes" machine and to the organization of "The Z. G. Sholes Company" was clearly relevant and material, in order (a) to place before the Court the history of the Remington-Sholes Company, and (b) to establish the unnecessary selection of the name "Remington" as a designation of the defendant's machine.

The evidence referred to (Subdiv. 1, p. 1440) is found in deposition of Z. G. Sholes (Qs. 23–87, pp. 392–406), also articles of association of "The Z. G. Sholes Company" (pp. 816–824), and photograph of the "Z. G. Sholes" typewriter (p. 824).

The testimony is, in substance, that Sholes made certain improvements in typewriting machines, for which he filed application for letters patent; that models were built and finally a full sized machine; that in May, 1893, a corporation was formed under the laws of Wisconsin; that as Sholes was the inventor of the machine it was, naturally, called "The Z. G. Sholes" typewriter and the corporation "The Z. G. Sholes Company."

In a case like that at bar, in which the motives and intent of the parties engaged in an unlawful and a fraudulent scheme are pertinent, it was eminently proper to place before the Court the history of the transaction of the Remington-Sholes Company preceding the organization thereof.

The evidence was also material as establishing that the body of associates who organized the "Remington-Sholes Typewriter Corporation" *unnecessarily* chose the name "Remington" as a part of its corporate name and product.

A corporation was already in existence. The machine was already baptized with the name of its inventor "Sholes." Why change it?

The inference is irresistable that the change was made with the intention to initiate an inequitable competition with complainant.

Cases in which evidence of this character has been introduced and commented upon with approval by the Court are numerous. We beg leave to refer to the following for illustration:

> Stuart *v.* F. G. Stewart Co., 91 Fed. Rep., 243; Garrett *v.* T. H. Garrett & Co., 78 Fed. Rep., 472; R. W. Rogers Co. *v.* William Rogers Mfg. Co., 70 Fed. Rep., 1017; International Silver Co. *v.* Simeon L. & Geo. H. Rogers Co., 110 Fed.

Rep., 955; Gray *v.* Taper Sleeve Pulley Works, 16 Fed. Rep., 436; Celluloid Co. *v.* Cellonite Co., 32 Fed. Rep., 94; Fuller *v.* Huff, 104 Fed. Rep., 141; International Silver Co. *v.* Wm. G. Rogers Co., *et al.*, 113 Fed. Rep., 526; The Peck Bros. & Co. *v.* Peck Bros. Co., *et al.*, 113 Fed. Rep., 291.

(2). That part of defendant's motion by which it is sought to strike out certain testimony as not proper rebuttal, raises a question of the order of proof merely. This was a matter within the discretion of the Trial Court and its ruling in that respect will not be reviewed on appeal.

This evidence is referred to in Subdivision 2 of defendant's notice of motion (p. 1441).

It is conceded that the evidence is material, but, it is argued, it should have been introduced on *prima facie* proofs.

In overruling this portion of the motion, the trial Court said, "Perhaps some of the testimony taken in rebuttal is not strictly such, but is rather cumulative; still it is such as would be admissible, if taken at the proper time, or, with leave, and as the motion has been brought along by consent to the hearing in chief, and the testimony might be the subject of a motion to retake, without intending to relax the rule as to order, it is deemed best, under the circumstances, that this testimony be left to stand for what it is worth" (p. 1496).

This decision, we submit, is conclusive on appeal.

"As a matter of law, the order of proof in the trial Court is within the discretion of the trial judge, and his rulings in that respect cannot be reviewed in error."

Turner *v.* United States, 66 Fed. Rep., 280 at 284-5. (Pardee, *J.*, for Circuit Court of Appeals).

See also Kansas City *v* McDonald, 61 Fed. Rep., 178 at 182.
Anheuser Busch Brewing Case, 87 Fed. Rep., 864, 868.
Railway Co. *v.* McDonald, 51 Fed. Rep., 178.
Marshall *v.* Davies, 78 N. Y., 414, 420.
Agate *v.* Morrison, 84 N. Y., 672, 673.
Clays *v.* Ferris, 10 Vt., 112.
Dane *v.* Treat, 35 Me., 192.
Ford *v.* Miles, 1 Hill (N. Y.), 300.
Hasting *v.* Palmer, 20 Wend. (N. Y.), 225.

Furthermore, no harm resulted thereby, for defendant had ample opportunity to reply to such evidence and *availed itself thereof by adducing such proofs on surrebuttal as it deemed necessary.*

(Pp. 1372–1439).

Finally, the notice of motion was too broad Certain portions of the depositions sought to be eliminated from the case were plainly proper rebuttal.

Drexel *v.* True, 74 Fed. Rep., 12.
Amer. Express *v.* Langford, 93 Fed. Rep., 380.

The defendant in its answer and by its proofs sought to maintain that its machine was sold by the arbitrary and fanciful term "Rem-Sho."

(Answer paragraphs 13 and 14, pp. 25–26; see also evidence Baldwin, pp. 1012, 1013; Hatch, pp. 1051–53; Hochklassen, pp. 1102, 1106).

It was therefore competent and proper for complainant to prove *in rebuttal* that the designation "Rem-Sho" was a mere abbreviation of the name "Remington Sholes," and so understood by the trade.

(3). The testimony relating to the acts, advertisements, and mode of doing business of dealers

and middlemen in the sale of the machines of the Remington-Sholes Company in foreign countries, sought to be stricken out, was clearly relevant to the issues in this case because (a) it showed the likelihood of deception of the ultimate purchaser abroad; (b) because it was a practical demonstration of how the name "Remington-Sholes" could be used by unscrupulous dealers as an instrument of fraud; (c) because it was part of the res gestae; (d) because the manufacturers and dealers being co-conspirators and tort-feasors, the acts and declarations of any in furtherance of the common scheme are relevant against all, and (e) because the action being one in fraud, great latitude is allowed in the admission of evidence.

This evidence is all covered by subdivisions 3, 4 and 5, of defendant's notice of motion and consists of:

(*a*) Various advertisements of dealers and agents for the *Remington-Sholes typewriter* in Russia, France, Germany, Denmark, England and Canada, containing grossly misleading and false statements with regard to the origin and manufacture of the Remington-Sholes typewriter, and tending to link or connect the business of the Remington-Sholes Company with complainants', and produce an impression in the minds of the public that the *defendant's machine was a product of complainant, and was the genuine "Remington" writing machine.*

In this connection the attention of the Court is invited to the various advertisements of one T. I. Hagen, *who is the exclusive dealer in Russia for the sale of the Remington-Sholes machine*, and who advertised it not only as the "Remington-Sholes" (Record, pp. 893, 986), but, also, as the "Remington Imperial" (Record, pp. 889, 895), and among other things said "The factory, Remington Standard does not belong to any of Remingtons and passed into new hands, Wycoff, Seamans & Benedict long ago, *at the time when F. Remington and Mr. Sholes, the*

inventor of all Remingtons, left the business and established a factory of their own, conducted the same on as solid a basis as before." (See Record, p. 889. Deposition of Leo Nabokoff, Record, pp. 502-507. Deposition of Jones, Record, pp. 507-509 and John Volk, Record, pp. 464-466.)

Also various advertisements and publications of dealers and agents in Russia, Denmark, Canada, etc., referring to the Remington-Sholes machines as "Remington Typewriters," the "Genuine Remingtons," the "Little Remington," "New Model Remington," etc. (Record, pp. 885, 897, 898, 978, 889-891, 901, 986.) Also advertisements referring to the "Remington-Sholes" machine as "The only typewriter manufactured by a member of the well-known Remington family, the original manufacturers of the Remington Standard Typewriter." (Record, pp. 905, 908, 909, 973.) And again defendant's machine is referred to as "The only machine now manufactured by Mr. Remington," and it is further stated that "Mr. Franklin Remington, son and grandson of the old and celebrated American house, is the only member of that family now engaged in the manufacture of typewriters, and it is to him that we owe the greatly appreciated 'Rem-Sho' typewriter." (Record, p. 997.) Again in "Remington-Sholes Syndicate Prospectus" it is said: "Mr. Franklin Remington, founder of the Remington-Sholes Company, will join the board after allotment, his connection with this syndicate and the parent company in America, is a guaranty that the 'Rem-Sho' machine embodies the latest and best improvements known in typewriting machines, representing as he does the second generation of the family in the business—his father being the original maker of the Remington Standard Typewriter." (P. 905.)

It is stipulated that the person referred to in said publication is Mr. Franklin Remington, the manager of the "Remington-Sholes Company," and *that the statement in said prospectus was made with his consent and approval.* (Record p. 457.)

(*b*) A copy of an admitted affidavit or other evidence referred to is that of the same Franklin Remington, made by him in Russia before a U. S. Consul, for the purpose of publication, and printed in a Russian newspaper circulated in Moscow, stating that he "is the son of the original inventor of Remington typewriters," and "the only descendant of Remington at the present time engaged in the manufacture of typewriters," and that "*all other machines bearing the name 'Remington' are made and sold by other parties, who exclusively in the interest of their own material advantage make use of the name 'Remington.'*" (Record, p. 983. As to stipulation concerning this publication, see pp. 660, 661.)

(*c*) Testimony of a retrospective exhibit, so called, of the *Remington-Sholes Company* at the Paris Exposition, of an original machine manufactured by complainant's predecessors, with a notice thereon stating that it was invented "by the father of the inventor of the Rem-Sho, which was later improved and manufactured by E. Remington & Sons." (Pp. 1001-1002, Testimony of McClain, pp. 610-611; Wallau, 612-617.)

(*d*) Also the testimony of John F. McClain showing that the average or ordinary purchaser of typewriters abroad is unfamiliar with the structure, mode of operation and physical appearance of complainant's machines, and that the same are very largely sold in foreign countries, and are there known, identified, offered for sale and sold as the "Remington." (Record, p. 606).

The defendant claims that this testimony as to the acts and transactions of dealers and middlemen in foreign countries, not shown to be the agents of the Howe Scale Company, or of the Remington-Sholes Company, is not relevant to the issues here, because (a) it is not shown that these acts and advertisements were authorized by the defendant or Remington-Sholes Company and (b) because the

testimony calls for matters transpiring in foreign countries and determinable by the laws of such countries. (See objection to same, pp. 608–9).

In overruling this branch of defendant's motion, the Court below held: that the evidence was relevant, (a) because it related to machines eminating from the Remington-Sholes Company under whom the defendant, the Howe Scale Company, had acted and justified; (b) because it related to transactions in respect of such machines in connection with the complainant's machines and its trade name, and although not proceeding directly from the Remington-Sholes Company, or from the Howe Scale Company, or authorized by either, was admissible as part of the *res gestae* for the purpose of showing the effect upon complainant's trade of putting the machines of the Remington-Sholes Company into the markets with the name "Remington upon them; and that this being a suit for interference in trade—unfair competition—the boundaries of the dealings, or trade, and not of governments or countries, were material in determining the question whether or not the ultimate purchaser was likely to be deceived or mislead; and finally, that the laws of foreign countries would not govern or vary the rights of parties here in respect to fraudulent transactions emanating here, although carried out and consummated in foreign countries (see opinion, Rec., pp. 1496–1497).

Attention is called in passing to the fact that a large portion of the testimony sought to be stricken out consists of the authorized statements, affidavits and advertisements of Franklin Remington, the admitted manager and agent of the Remington-Sholes Company.

Manifestly, however, the defendant's contention proceeds on a mistaken and narrow theory of the issues involved in this litigation. The question to be determined here by the Court is whether or no the means employed by the defendant and by the Remington Sholes Company, under whom it justi-

ties, and the designations used by them in their business and on their product, tend unfairly to divert trade from the complainant and attract it to the defendant and the Remington Sholes Company, and whether their acts constitute an unfair and fraudulent competition which equity will arrest.

In its last analysis, the test of infringement is this: Is the objectionable mark, trade name, device or symbol, calculated to deceive the ultimate purchaser or the consumer of the goods.

Mr. Kerly, in his valuable work on Trade Marks (London, 1901), at page 224, says: "The persons to be considered in estimating whether the resemblance between the marks in question is calculated to deceive, are all those who are likely to become purchasers of the goods upon which the marks are used." And again (page 225), "**Nor is the inquiry to be confined to England, or persons acquainted with the English language, in cases where the goods in question have a foreign market.**" The same test is also adopted in Fairbank Co. *v.* Bell Mfg. Co., 77 Fed. Rep., 869 at 878.

Johnson *v.* Orr-Ewing, 77 App. Cases, 219 (1882).

Wilkinson *v.* Griffith, 8 R. P. C., 374 (891).

Singer Mfg Co., *v.* Loog, 10 C. D., 412.

Seabastian's Law of Trade Marks, 4 ed., pp. 6, 116, 133, 158, 164, 221.

As is well stated by Chitty, *J.*, in Lever Bros. *v.* Goodwin, 36 C. D., 1: "Now, it has been said more than once in this case that the *manufacturer* ought not to be liable for the fraud of the ultimate seller, that is, the shopkeeper or the shopkeeper's assistant; but that is not the true view. The question is whether the defendants have or have not knowingly put in the hands of the retail dealers the means of deceiving the ultimate purchaser."

Indeed, this test of infringement was not disputed by the learned counsel for the defendant in his brief in the Court below. He there says, "we quite agree with counsel that the deception of the ultimate purchaser is a rightful test of infringement" (p. 21).

The inquiry, therefore, becomes as broad as the market where complainant's goods are sold. It is not limited to the particular country where the action happens to be brought, but extends to those countries and states where the goods come into competition with the goods bearing the infringing names or devices used by the defendant, for it is there that the ultimate purchaser or consumer is to be found.

It is an admitted fact in this case that complainant's machines are sold in foreign countries, and among others in Russia, France, Germany, Denmark, England and Canada. It is also an admitted fact that the machines produced by the Remington-Sholes Company, and bearing the name "Remington," are sold also in those countries in competition with complainant's goods.

The evidence, therefore, regarding the circumstances attending the sale of defendant's machines under the name and designation "Remington-Sholes" and "Rem-Sho" in these foreign markets became pertinent and illuminative on the question of infringement.

We submit the Court below was right in holding that the boundries of dealings and not of countries constituted the limits of investigation.

It was not sought to charge the defendant, the Howe Scale Company, with the acts of independent dealers or middlemen, who sold the Remington-Sholes machines in foreign countries. The evidence was introduced for no such purpose. It was with the object of aiding and assisting the Court in determining whether the use of the name "Remington" by the defendant and its principals was likely to mislead the ultimate purchaser wherever found.

In other words, the evidence was admissible as a part of the *res gestae* for the purpose of showing the actual effect upon complainant's trade of permitting the defendant and its principals to put machines into the market with the name "Remington" upon them. This evidence was in the nature of a practical demonstration of how the designation of "Remington-Sholes" and the abbreviated term "Rem-Sho" might be used and were in fact being used by unscrupulous dealers and middlemen to deceive and hoodwink the ultimate purchaser.

Some point was made in the Court below, and may be here, that because this suit was originally brought against the Howe Scale Company, the sales agent for the United States of the Remington-Sholes Company. and because the bill charged infringement solely within this country, the evidence should be limited to acts arising in the United States. Any force that may have existed in this argument as applied to the action as originally brought has ceased, we submit, by reason of the intervention of the Remington-Sholes Company, now Fay-Sholes Co., as a defendant in this action, and by the alleged justification of the Howe Scale Company under the right and title of the Remington-Sholes Company.

On its own motion, the Remington-Sholes Company openly intervened in this action, assumed the burden of defense, employed counsel, examined and cross-examined the witnesses, and agreed to indemnify and save harmless the defendant Howe Scale Company (p. 158); and one of the petitioners for the writ of certiorari was the "Fay-Sholes Company" [The Remington-Sholes Company], and among the grounds urged for the issuance of the writ was that "The defense of this cause has from its inception been conducted wholly at the expense of your petitioner, Fay-Sholes Company, and by counsel of its own selection." (See Petition, p. 11.)

By its acts, therefore, the Remington-Sholes Company became the real defendant, and the decision of the issues involved in this appeal will finally de-

termine its right as well as that of the Howe Scale Company to the use of the name "Remington" upon and in connection with the manufacture and sale of typewriters.

Black on Judgments, Sec. 640.

Both the Circuit Court in its opinion (Rec., p. 1496) and the Circuit Court of Appeals in its opinion treat the Remington-Sholes Company as the real defendant. In the opinion of the latter Court it said: "The nominal defendant is a sales agent only, the real defendant which has assumed the defense of the suit is the Remington-Sholes Company of Chicago, Ill." (P. 1521.)

In view of these facts it is hard to see any force in the defendant's argument that because the bill was originally filed against the sales agent in the United States it should be limited to transactions occurring therein. It was a proven and conceded fact in this case that the market of the Remington-Sholes Company was co-incident with the complainant, and that it had sold its machines in Russia, Germany, England, Canada, Denmark and Sweden. Its catalogue and other advertising media show that it had offices in these foreign countries, and its petition for the writ of certiorari to this Court stated that its typewriting machines "were being extensively sold not only in all the principal cities in this country, but also in the principal cities of most of the civilized countries throughout the world" (Petition, p. 6.)

The Remington-Sholes, therefore, being the real defendant in this action, the acts of its dealers and representatives, and of middlemen selling its goods, whether here or in foreign countries to which it sent them, and in which they came in competition with the complainant's goods, were material and relevant on the issue of infringement.

But there is another point of view from which this evidence became relevant.

It has frequently been held in cases brought for the infringement of trade names—"passing off"—*that the manufacturer who purchases, and the dealer who sells the article with the spurious name, mark or symbol upon it are to be considered as co-conspirators and joint tortfeasors combining and confederating together to filch the good-will and reputation of another.*

If this statement is a correct exposition of the law, the acts and statements of all dealers who sell the infringing machines are the acts and statements of persons conspiring together in the furtherance of a joint scheme to defraud and, under the well-known rule, are admissable in evidence against one another.

Stephens on Evidence, p. 10.

Once again, the *gravamen* of the bill of complaint here is fraud, and fraud being difficult of proof, and generally to be inferred from facts and circumstances, the rule is established that *great latitude* is allowed in such cases in the admission of evidence. Every circumstance in the condition and relation of the parties, and every act or declaration may be shown which bears upon the transaction under investigation. Am. and Eng. of Law (2nd Ed.), Vol. 14, pp. 195, 196.

Furthermore, one of the grounds urged with much insistance by the defendant and the Fay-Sholes Company in the petition and brief for the *writ of certiorari* was that the typewriting machines of the Remington-Sholes Company "had been extensively sold in many foreign countries and particularly in the German Empire, in France, Denmark, Norway, Russia and Austria by dealers in said several countries"; that such dealers had been threatened with suits by the complainant; that in fact one suit had been instituted and said petitioners feared that "serious injury may result to dealers in Germany and other foreign countries" and "to the foreign trade of your said petitioner if the said

decision of said Circuit Court of Appeals for the Second Circuit in this cause is allowed to stand uncorrected."

(Petition, paragraph 9, pp. 12–13. Brief submitted therewith, pp. 34–35).

If this Court is to consider the effect of the decision below on the foreign dealers and agents of the "Remington-Sholes" machines and the possibility of injury to such dealers thereby is to be taken as a factor in reaching a decision here, it is clear that evidence of the character and acts of such dealers and their grossly misleading representations can be offered by the complainant.

In support, of its contention, defendant's counsel cited in the Court below several cases and the same will probably be referred to here. Among these were the cases of Coats *v.* Merrick, 149 U. S., 562; Brown Chemical Co. *v.* Meyers, 139 U. S., 540; Proctor & Gamble Co. *v.* Globe Refining Co., 92 Fed. Rep., 357, and Sterling Remedy Co. *v.* Eureka, etc. Co., 80 Fed. Rep, 105. And various excerpts were made from the opinions in these cases to the effect that the manufacturer would not be held responsible for the frauds of independent dealers.

A critical examination in these cases will show that no one of them militates against the complainant's contention here. In all of them the Court held, as a primary proposition, that the defendants had not been guilty of any wrongful act, that is, *that they had not so marked or dressed up their goods as to be chargeable with unfair competition.*

Having found that the name or device used by the defendants did not constitute an infringement of the trade rights of the complainants, the Court in these cases properly held that no independent unauthorized fraud of dealers and middlemen in substituting the goods of the defendant's for the complainants' could render the defendants liable. If the Remington-Sholes Company had marked its machines *with an entirely different name*, as for example in Coats *v.* Merrick, (Ibid), where the de-

fendants marked its goods with the name "Merrick," as distinguished from "Coats," then the defendants' contention would be of force herein.

In the case at bar, the defendants have appropriated the complainants' trade name "Remington" and placed it upon their machines and used it in their catalogues and advertisements and stated therein that their machine was the only typewriter made by a Remington and that the Remington-Sholes Company was the second generation of typewriter builders bearing that great name. Hence, this case in its facts and circumstances is clearly distinguishable from the cases above cited.

For each and all of the above reasons, it is therefore submitted that the ruling of the Court below admitting this evidence was right.

(D) No error was committed in failing to tax the costs of the alleged objectionable evidence against the complainant.

A point was made by defendant that the Court below erred in failing to *tax the costs* of this alleged immaterial evidence on the complainant.

Aside from any question of the competency thereof, it is to be urged in answer that no such relief was asked for in the notice of motion.

The motion was simply "to suppress" the evidence. No motion was made in any Court to tax the costs of this evidence against complainant herein.

No such request was made in the defendant's brief filed in the Circuit Court and no such request was made in the Circuit Court of Appeals.

It follows from that which has been said above that the Circuit Court properly overruled defendant's motion to suppress said evidence.

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